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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ISRAEL G. GROSSMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, New York 10007
(212) 513-7676

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Mark D. Cahn
Victoria B. Eiger
Of Counsel

Attorneys for Petitioner
Israel G. Grossman

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a federal prosecution, the defendant must prove specific prejudice in order to establish that his Fifth and Sixth Amendment rights have been violated when he is forced to trial two business days after the return of a superseding indictment which, among other things, added ten new counts and radically changed the nature, scope and time frame of the case against which he had to defend.

2. Whether criminal sanctions may be imposed upon an attorney under Section 10(b) of the Securities Exchange Act and Rule 10b-5 for "misappropriating" information from his law firm and its client where the law firm and the client -- neither of

which purchased securities from nor sold securities to Petitioner -- are the alleged victims of the fraud.

3. Whether confidential information about a proposed recapitalization entrusted to a law firm by a client for the limited purpose of obtaining legal advice is "property" of the law firm or the client within the meaning of the mail fraud statute where the information was not commercial information gathered or developed by the client or the law firm, where neither the client nor the law firm had the right to use the information for any commerical purpose, and where the only injury which could arise from misappropriation of the information was injury to the law firm's reputation.

4. Whether a defendant is entitled under Brady v. Maryland to access to admittedly exculpatory grand jury testimony of an alleged co-conspirator who does not testify at trial but whose hearsay statements inculpating the defendant are introduced through another prosecution witness.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., amend. V provides, in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

U.S. Const., amend. VI provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ....to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), provides, in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interestate commerce or of the mails, or of any facility of any national securities exchange ....
>
> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,

> any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. §240, 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any national securities exchange,
> (a) to employ any device, scheme, or artifice to defraud,
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, 'in connection with the purchase of sale of any security.'

The mail fraud statute, 18 U.S.C. §1341, provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used,] shall be fined not more than $1,000 or imprisoned not more than five years, or both.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in United States v. Grossman is reported at 843 F.2d 78 (2d Cir. 1988), and is set forth in the appendix at A-1.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on March 25, 1988. (A-1) The order denying a petition for rehearing and suggestion for rehearing en banc was entered on May 9, 1988. (A-21) On motion of the Petitioner, Justice Thurgood Marshall granted Petitioner's request that the time for filing a petition for a writ of certiorari be extended to and including August 5, 1988. (A-23)

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On March 17, 1987, the grand jury for the Southern District of New York returned a 24 count indictment which charged Petitioner Israel G. Grossman with 12 paired counts of securities fraud and mail fraud premised on the Second Circuit's controversial "misappropriation" theory of securities fraud. The indictment charged that Grossman, an attorney employed as an associate in the pension department of the New York law firm of Kramer, Levin, Nessen, Kamin & Frankel ("Kramer, Levin"), committed, or aided and abetted the commission of, securities fraud and mail fraud in connection with purchases of options to buy shares of Colt Industries, Inc. ("Colt" or "the company").

The indictment alleged that Kramer, Levin represented not Colt, but the Trustees of Colt's Pension Plan, and that the Pension

Plan, an owner of Colt stock, had entrusted to the law firm confidential, non-public information it had received from Colt regarding a proposed recapitalization of the company. Under the recapitalization proposal, each shareholder except the Pension Plan would receive $85 cash and a share in the newly capitalized company. (The company's shares were trading at $66 to $70 at the time.) The Pension Plan would receive, pursuant to a certain formula, only shares, no cash. Kramer, Levin was retained by the Trustees of the Plan to advise whether the proposal was fair and whether it should be approved. The indictment also alleged that the law firm had a policy forbidding its employees from trading in securities on the basis of confidential, non-public information and forbidding the disclosure of confidential information to others.

The 12 securities fraud counts charged that, between July 11 and July 18, 1986, Petitioner Grossman engaged in a scheme to defraud Kramer, Levin and its "clients" "in connection with" certain purchases of Colt stock options by George Hirschberg, Walter Herzberg, and Norman Stein. Hirschberg and Herzberg were, respectively, Grossman's uncle and cousin. Stein was not related to Grossman but was a friend of Shimon Lev, the husband of one of Grossman's cousins.

The indictment included 12 matching mail fraud counts based on the 12 purchases of Colt options. The alleged mailings were, in each instance, the mailing of brokerage confirmations by the broker or clearinghouse to the option purchaser, Hirschberg, Herzberg or Stein.

Trial was scheduled to commence on Monday, August 3, 1987. On Thursday, July 30, 1987, just two business days before the trial date, a superseding indictment was returned over the defendant's vigorous claims of prejudice.

The new indictment differed in several important respects from the original one. This indictment spelled out in greater detail the government's misappropriation theory. More significantly, unlike the initial indictment, it put Petitioner on notice, for the first time, that the government claimed that he had personally benefited from the scheme. In addition, it extended the term of the alleged fraudulent scheme. The original indictment charged a scheme which occurred during a discreet period in July of 1986. The new indictment, in vivid contrast, alleged that the scheme <u>began</u> in July of 1986 but

continued to and including the date of the filing of the second indictment, over a year later.

Finally, the new indictment contained 38 counts, 14 more than the original indictment. Four of the new securities fraud counts (and corresponding mail fraud counts) arose from splitting into two counts transactions which were stated as one count in the initial indictment.

But five of the new securities fraud counts and five corresponding mail fraud counts were entirely new. They involved purchases of Colt call options and stock on various dates in July by Saul Listokin, Grossman's brother-in-law, a person never even mentioned in the original indictment. Nevertheless, over defendant's claim of

prejudice and inadequate time to prepare a defense, the defendant was forced to trial on the new indictment the following Monday.

At the trial, the government's chief witness was David Lev, the brother of Shimon Lev. David Lev was a convicted perjurer who was out of the country when all of the Colt option purchases were made and who had no contact whatsoever with Petitioner. Nevertheless, over objection, he was permitted to testify about conversations he claimed he had had with his brother Shimon Lev. All of these conversations occurred after July 23, 1986 that is, at a time outside the period described in the original charge but within the extended time frame of the superseding indictment, and all concerned purchases of Colt options by Norman Stein. It was his testimony which purported to establish that Petitioner himself profited from the

securities transactions. Specifically, if both the fact and the substance of David Lev's reported hearsay conversations with his brother Shimon Lev were believed, they showed that Petitioner had tipped Shimon Lev about the Colt recapitalization, that the disclosure was not innocent or inadvertent, and that based on the tip Norman Stein had purchased Colt options for himself and for Shimon Lev. Crucially, David Lev also testified that Shimon Lev had told him that Grossman himself had a financial interest in the securities transactions and that Grossman was paid his share of the proceeds via a check for $25,000 from David Lev (who was then holding Shimon's profits) which he, David Lev, made out in blank and gave to Shimon at Shimon's request.

At the same time, however, the prosecution -- but not the defense -- had Shimon Lev's sworn grand jury testimony in

which, apparently, he had exculpated Israel Grossman and denied Grossman's involvement. The prosecution took the position that its Brady obligation was fully discharged by notifying Grossman that Shimon Lev might have exculpatory information; it refused to turn over his concededly exculpatory grand jury testimony, and the trial court refused to order the prosecution to turn it over.

The remainder of the government's case was entirely circumstantial, tending to establish, through Kramer, Levin witnesses, that Petitioner may have learned about the Colt recapitalization plan through his colleagues at the law firm and, through the law firm's telephone records, that telephone calls were placed from Petitioner's office to his relatives around the time that they were purchasing Colt options. A Kramer, Levin partner testified that the firm had a

confidentialty policy which was important to getting and keeping business and which was designed to insure compliance with the securities laws.

Through employees of brokerage houses and their clearinghouses, the government proved that George Hirschberg, Walter Herzberg, Saul Listokin and Norman Stein purchased out-of-the money call options for Colt stock. There was testimony that, pursuant to their general business practices, the brokerage houses or clearing houses mailed confirmation slips for each purchase to the option purchaser, confirming that a requested purchase order had been executed and stating the price at which the purchase had been made.

The proposed recapitalization plan was approved and, after the announcement of the recapitalization plan, Colt stock rose substantially in value. The Listokin account

had sold its options before the recapitalization announcement, and had lost money on the transactions. The other option purchasers -- Hirschberg, Herzberg and Stein -- made substantial profits on their investments in Colt options.

The government's evidence on the Listokin counts, the new charges which were first mentioned in the superseding indictment, was rather different. As to these transactions, the government purported to have proof of Grossman's direct personal, albeit surreptitious, involvement in the purchase of Colt securities. Based on testimony of a Whitehall Securities' executive that the customer who opened the Listokin account was extremely nervous, that witness's failure to identify Listokin from a photograph, and expert testimony that the signature on the original account documents was not in fact

Listokin's, the government argued that it was Petitioner himself who visited Whitehall Securities and opened the account in Listokin's name. Based on the congruence of Kramer, Levin telephone records and Whitehall Securities' business records which recorded the time of day when purchase orders were executed, the prosecution also claimed that it was Petitioner himself who, by telephone from his office at Kramer, Levin, actually placed the purchase orders for Colt options through that account.

Petitioner's defense was that guilt was not proved beyond a reasonable doubt. By focusing on the circumstantial nature of the proof, and through cross-examination of the government's witnesses, he sought to establish that he had not surreptitiously obtained

information known by him to be confidential and that he had no culpable involvement in the charged purchases of Colt securities.

The jury convicted Petitioner on all counts. He was sentenced to a two year prison term.

The Court of Appeals for the Second Circuit affirmed. The Court rejected Grossman's claim that he should not have been forced to trial two days after the return of a superseding indictment, noting that he had adequate notice -- through discovery and an SEC civil proceeding -- "of the Listokin trades and the government's interest in them" (A-14) and ruling that the "superseding indictment did not alter substantially the government's case against Grossman." (A-15) The Court of Appeals rejected his claim that the confidential information at issue was not property of the type protected by the mail

fraud. (A-16) The Court of Appeals also rejected his claim that he was entitled to have had the exculpatory grand jury testimony of Shimon Lev under Brady v. Maryland, 373 U.S. 83 (1963), and Fed. R. Crim. P. 6(e). (A-15-16) Petitioner preserved for review in this Court his challenge to the validity of the Second Circuit's "misappropriation" theory of securities fraud. (Brief of Defendant-Appellant in the Court of Appeals at 44.)

REASONS FOR GRANTING THE WRIT

POINT I

DUE PROCESS IS VIOLATED AND THE ENDS OF JUSTICE ARE ILL-SERVED WHERE A DEFENDANT IS GIVEN ONLY TWO DAYS' TIME TO PREPARE A DEFENSE TO A SUPERSEDING INDICTMENT WHICH, AMONG OTHER CHANGES, ADDED TEN ENTIRELY NEW COUNTS AND DRASTICALLY CHANGED THE NATURE AND THE SCOPE OF THE CASE AGAINST WHICH HE WAS CALLED UPON TO DEFEND

In United States v. Rojas-Contreras, 474 U.S. 231 (1985), this Court held that the Speedy Trial Act of 1974, 18 U.S.C. §3161 et seq., does not prohibit commencement of a trial less than 30 days after the defendant's arraignment on a superseding indictment. The Court left to the trial court's discretion the power to grant a continuance where the return of a superseding indictment necessitates further defense preparation. Justice Burger, writing for the Court, predicted that:

> The authority of the District Court to grant an "ends of justice" continuance should

> take care of any case in which the Government seeks a superseding indictment which operates to prejudice a defendant.

106 S.Ct. at 558. Justices Blackmun and Brennan, concurring, were more specific about when trial court's must recognize a defendant's right to defense preparation time following the return of a superseding indictment. They noted that not every superseding indictment burdens a defendant for "[f]requently, a superseding indictment is used to drop charges or parties or, as here, to make a minor correction leaving the charges and the evidence necessary to defend against them unaffected." Id. at 560. But, they recognized, some superseding indictments do "add to a defendant's burden in preparing for trial." Id.

> In the event of additional charges, a defendant may well need additional preparation time. The Constitutional right to assistance of counsel is

> rendered meaningless if a defendant is forced to trial in the absence of adequate time to prepare. To avoid prejudicing a defendant, a continuance should be granted when there is a meaningful possibility that a superseding indictment will require an alteration or adjustment in the planned defense. Trial courts should bear in mind that counsel may require time fully to analyze the impact of the superseding indictment, and to explore any options it presents or precludes.

Id., footnote omitted.

As this case demonstrates, the advice of Justices Blackmun and Brennan has gone unheeded and Justice Burger's prognostication that the availability of an ends-of-justice continuance "should take care of any case" in which a superseding indictment ... prejudice[s] a defendant" has gone unrealized. Rather, in this case the Second Circuit has adopted a rule which turns this Court's assumptions on their head. Under the Second

Circuit's rule a defendant is not entitled to any defense preparation time following the return of a superseding indictment -- even one which adds numerous new charges and reflects massive changes in the government's case -- unless the defendant can demonstrate actual prejudice. And, according to the Second Circuit, a defendant cannot demonstrate such prejudice if he had notice -- through any source -- of the government's "interest" in the facts underlying the new charges and/or if the evidence introduced to prove the charges in the superseding indictment might have been introduced at a trial on the original indictment.

Under the Second Circuit's ruling, the defendant's need to prepare a defense to new charges or to explore options the new indictment presents or precludes is, entirely irrelevant.

The rule announced in this case by the Second Circuit, a major departure from the rule previously applied in that Circuit, can only work great mischief in the administration of justice in the federal courts. By placing a burden on the defendant to demonstrate specific prejudice as a result of trial without defense preparation time, it renders meaningless the defendant's Sixth Amendment rights to counsel and to present a defense. And it directly compromises the integrity of the fact-finding process.

In complex federal criminal prosecutions, superseding indictments are no longer the exception, but the rule. Given the demands inherent in heavy federal court caseloads and those exerted by the Speedy Trial Act on the calendars of the federal district court judges, there are tremendous pressures to keep

a previously set criminal trial date firm; a continuance can wreak havoc on a district judge's tightly scheduled calendar.

As this case demonstrates, it is apparent that a body of rules must be developed which will give clear guidance to both federal prosecutors and district judges as to when additional preparation time must be granted following return of a superseding indictment or when, alternatively, the prosecution must rest content with prosecuting the defendant on only those charges set forth in the original indictment. Indeed, a per se rule mandating a minimum of 30 days' preparation time upon the defendant's request whenever a superseding indictment adds new criminal charges may be appropriate. But per se rule or not, in this case, the Constitution was violated, and the proceeding was unfair where the defendant was forced to trial without any significant time

to prepare a defense to ten new counts, added at the last minute. Because, on these new counts, the prosecution claimed that Petitioner personally made securities purchases, it is patent that their addition not only required him to prepare a defense as to these specific charges, but also compelled him to adjust his overall defense to take the government's evidence into account. At the very least, in light of the fact that the five new mail fraud charges were based on a mailing by a different brother, it was crucial that the defense have a chance to investigate the office procedures and mailing practices of that broker.

The ten new counts added by the superseding indictment were, in quite another respect, not merely more of the same. It is no exaggeration to say that they massively shifted the focus of the government's case.

It was the prosecution's contention, based on a witness's failure one year later to identify Saul Listokin as the person who opened the trading account bearing his name, and an opinion that the signature on the original account-opening papers was not really Listokin's, that it was Petitioner himself, who opened the Whitehall account, masquerading as Listokin and signing Listokin's name to the account documents. It was further the government's contention -- and, an extraordinarily damaging one since it linked the Petitioner directly to the purchase of the Colt options -- that, during telephone calls placed from his office to Whitehall Securities, it was Petitioner himself who placed orders for the purchase of Colt options in Listokin's name.

As the prosecutor implicitly recognized when he told the trial judge that he "needed" the superseding indictment, none of this extremely damaging evidence would have been admissible in the case had the government gone to trial on the original indictment. And, if it was to be admitted at Petitioner's trial, simple fairness and the requirements of due process demanded that Petitioner be accorded an opportunity to prepare a defense to it. For example, the suggestion that it was not Listokin, but Petitioner himself who opened the trading account made it critical for Petitioner to demonstrate who it was, if not Listokin, who opened the account. The introduction of the Listokin transactions also made it extremely important to challenge the validity or reliability of the Kramer, Levin telephone records insofar as they purported to record or reflect the time of day telephone

calls were made. This was a subject which was completely irrelevant with respect to all of the non-Listokin, non-Whitehall telephone calls but it was absolutely critical to the validity of the inference that orders for Colt securities in the Listokin account were placed by telephone calls made from Grossman's office at Kramer Levin.

The district judge apparently concluded that Grossman had adequate warning because he was aware that the government was interested in the Listokin transaction; they were a part of the SEC's allegations against Petitioner and others in a civil suit. The Second Circuit endorsed this reasoning. It ruled that Petitioner could show no prejudice (notwithstanding his conviction on ten felony counts based wholly on the Listokin trades) since he had notice -- via pretrial discovery and the civil proceeding -- "of the Listokin

trades and the government's interest in them." (A-14) But a civil suit cannot give a defendant notice of criminal charges sufficient to satisfy due process. Under our Constitution it is the indictment which most apprise the defendant of what he must bebe prepared to meet Russell v. United States, 369 U.S. 749, 763 (1962). Knowledge of the government's "interest" in a particular set of facts is not the equivalent of notice to a defendant that he will be compelled to defendant against charges based on those facts in a criminal proceeding.

Likewise, the superseding indictment's expansion of the time frame and its allegation, for the first time, that Petitioner had personally profited from the alleged scheme were changes which were substantial and which, by their nature, necessitated consideration of changes in

defense strategy. Plainly, the changes in the indictment were sought by the prosecution to reflect both a change in the prosecution's theory of the case, and a major shift in its evidence and trial strategy. By expanding the time frame and introducing the allegation that Grossman had himself profited from this scheme, the superseding indictment provided the framework for a far more complex set of charges against the Petitioner than did the original charge. Furthermore, in laying out that framework, it provided the vehicle through which the government was able to introduce, mostly through highly suspect "co-conspirator hearsay" testimony, a great deal of damaging, through highly dubious, evidence. Specifically, the prosecution was able to present to the jury David Lev's report of his co-conspirator conversations with Shimon Lev about Grossman's involvement.

The Second Circuit framed the issue as whether Petitioner was prejudiced by the superseding indictment. The Court concluded that he was not on the ground that the same evidence could have been admitted even at a trial on the original indictment. But, Petitioner maintains, that test of prejudice is not the proper standard, as the Second Circuit formerly recognized in United States v. Guzman, 754 F.2d 482 (2d Cir. 1985), cert. denied, 106 S.Ct. 758 (1986), a rule it has now inexplicably repudiated.

In that case, the defendant complained on appeal that he had been forced to stand trial one day after the filing of a superseding indictment which expanded the scope of the charged narcotics conspiracy from a time period of two days to one of almost two years. The government's argument was that Guzman was not prejudiced because the same evidence could

have been presented at a trial on the original indictment. The Second Circuit rejected the government's argument and reversed Guzman's conspiracy conviction:

> By focusing on the prosecution's case and the fact that the evidence introduced at trial on the superseding indictment was the same as that which the government had expected to use at the first trial, the district court neglected to take into account the impact that the second indictment might have had on defense theories of the case, and the defendant's need for a more extended preparation.

754 F.2d at 486. The Second Circuit has now adopted a rule which, notwithstanding Rojas-Contraras, neglects to take into account the impact the superseding indictment might have on defense theories of the case and the defendant's need for further preparation.

This Court has cautioned that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the

right to defend with counsel an empty formality." Ungar v. Sarafite, 376 U.S. 575, 589 (1964). Ironically, in this case, expeditious disposition of criminal charges was not even an issue. The defense was ready, willing and able to go to trial, as scheduled on the original indictment, as planned. It was the prosecution's unilateral decision to add a host of new charges at the last conceivable moment and the trial court's acceptance of this maneuver which gave rise to the problem.

In our adversary system, surprise claims, like surprise witnesses, are not favored. As this Court recently stated in Taylor v. Illinois, 108 S.Ct. 646, 653 (1988), the adversary process can only function fairly and effectively if "each party [has] a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case."

The last-minute return of a superseding indictment which makes substantial change in the original charge, as this superseding instrument most certainly did, and the insistence that the defendant defend the new charges without a reasonable period of time to prepare a defense subverts the policies reflected in the Speedy Trial Act and, Petitioner contends, offends the Fifth and Sixth Amendments.

This case presents a question of substantial importance to prosecutors deciding whether or not to seek a superseding indictment, federal district judges who must make important and difficult scheduling decisions when superseding indictments are returned, and defendants, like Petitioner here, whose Constitutional rights to adequate notice of the charges against them and an

opportunity to plan and present their defenses are directly affected by those decisions. For these reasons, certiorari should be granted.

POINT II

CRIMINAL SANCTIONS MAY NOT BE IMPOSED UPON AN ATTORNEY, UNDER SECTION 10(b) AND RULE 10b-5, FOR "MISAPPROPRIATING" INFORMATION FROM HIS LAW FIRM AND ITS CLIENT, WHERE THE LAW FIRM AND THE CLIENT -- NEITHER OF WHICH PURCHASED SECURITIES FROM NOR SOLD SECURITIES TO PETITIONER -- ARE THE ALLEGED VICTIMS OF THE FRAUD

Certiorari should be granted in the instant petition to resolve an issue of extraordinary importance regarding the application and reach of the federal securities laws. Petitioner Israel Grossman was prosecuted and convicted on a theory of securities fraud which has divided this Court and which extends the reach of the federal securities statute well beyond that which either the statute or the decisions of this Court will permit. The Petitioner was convicted under a theory that misappropriation of confidential information by a fiduciary for

use in trading securities, regardless of who the seller or purchaser of securities is, violates Section 10(b) and Rule 10b-5. Indeed, the jury was instructed that, independent of any sale or purchase of securities, it would be sufficient to convict Petitioner under the securities laws if the jury found an "actual or potential injury ... to the reputation of the law firm." Tr. at 1369.

Fifty years of jurisprudence have established that the purpose of Section 10b and Rule 10b-5 is to protect public investors, not the reputation of a law firm.[1] The

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[1]As one observer recently noted:

> The Supreme Court and lower federal and state courts have consistently held that a major aim of securities legislation is to protect the investing public from unfair manipulation of the securities markets. Civil and criminal cases brought under Rule 10b-5

(footnote continued)

securities laws are designed to protect market participants against securities fraud; they are neither designed, nor drafted, to protect anyone against any kind of fraud, so long as there is some later contact -- however remote and unrelated -- with a securities trade. Petitioner did not defraud or injure any member of the investing public in connection

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likewise emphasize the protection of investors as one of the primary functions of the rule and section 10(b). Because the misappropriation theory relies on the damage done to employers rather than to investors, Rule 10b-5 has been improperly utilized as a vehicle to protect the reputations of employers. An employee's fraudulent breach of the duty of confidentiality constitutes a fraud against the employer, not against investors in the market.

Insider Trading and the Misappropriation Theory: Has the Second Circuit Gone Too Far?, 61 St. John's L. Rev., 78, 108 (1986).

with its purchase or sale of securities, his conduct did not fall within the prohibitions of the federal securities statutes.

"The starting point in every case involving construction of a statute is the language [of the statute] itself." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). This Court has noted that the Securities and Exchange Act of 1934 "cannot be read 'more broadly than its language and the statutory scheme reasonably permit.'" Chiarella v. United States, 445 U.S. 222, 234 (1980) (citations omitted). The 1934 Act provides the statutory basis for prescriptions of insider trading. Section 10(b) of the 1934 Act make it unlawful for "any person, directly ... to use or employ, in connection with the purchase or sale of any

security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations" as the SEC may prescribe. Rule 10b-5, in turn, prohibits "any person" from engaging in "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

"Manipulation" is "virtually a term of art when used in connection with securities markets." Hochfelder, supra, 425 U.S. at 199, in Santa Fe Industries v. Green, 430 U.S. 462, 476 (1977), the Court noted that the term generally refers "to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." There can be little question that the term, as

applied in the statute, refers to the manipulating of investors. As this Court observed in Santa Fe:

> Section 10(b)'s general prohibition of practices deemed by the SEC to be "manipulative" -- in this technical sense of artificially affecting market activity in order to mislead investors -- is fully consistent with the fundamental purpose of the 1934 Act 'to substitute a philosophy of full disclosure for the philosophy of caveat emptor ....'

430 U.S. at 476-77 (quoting Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972)).

The legislative history indicates that Rule 10(b) was promulgated "specifically to close 'a loophole in the protection against fraud ... by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." Note, Insider Trading and the Misappropriation Theory: Has the Second Circuit Gone Too Far?,

61 St. Johns L. Rev. 78, 88 (1986) (hereafter Insider Trading and the Misappropriation Theory), quoting SEC Securities Exchange Act Release No. 3230 (May 21, 1942)) (emphasis added). The rule, modeled after section 17(a) of the Securities Act of 1933,[2] was broadened to encompass manipulation in the sale of securities as well. Id.

This Court has faithfully limited the application of Rule 10b to those activities clearly proscribed by this regulation -- limiting the applicability to Rule 10b-5 to fraudulent nondisclosure. Through the 1960's

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[2]See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 867 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969):

> Although the authority for the Rule comes from section 10(b) of the Securities and Exchange Act of 1934, the draftsmen turned their backs on that section and borrowed the words of section 17 of the Securities Act of 1933, simply broadening these to include frauds on the seller as well as the buyer.

and 1970's, without support in either legislative history or statutory language, circuit courts attempted to expand the "list of insiders and transactions covered by [the Rule] and [relax] common law requirements for fraudulent nondisclosure while emphasizing the goal of achieving fairness and equal access to information for all investors in the securities markets." Insider Trading and the Misappropriation Theory at 93.[3] In response,

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[3]Not all circuit courts ignored the significance of the requirement that the injured party be an investor. As then-Circuit Judge Stevens observed in Eason v. General Motors Acceptance Corp.:

> The emphasis on the injured party's status as an investor indicates that the protection of the rule extends to persons who, in their capacity as investors, suffer significant injury as a direct consequence of fraud in connection with a securities transaction, even though their participation in the transaction did not involve either the purchase or the sale of a security.

(footnote continued)

this Court issued a series of decisions consistently holding that trading securities on the basis of undisclosed information is fraud under section 10(b) and Rule 10b-5 only where the trader owes a duty of disclosure of a market participant.

In United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978), rev'd, 445 U.S. 222 (1980), for instance, the Second Circuit had affirmed the conviction of a mark-up man, employed by a printer, who had discovered the names of companies targeted for tender offers by the printer's corporate employer and subsequently traded in these companies' stocks. The Circuit Court held that "[a]nyone -- corporate insider or not -- who regularly receives material corporate information may

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490 F.2d 654, 659 (7th Cir. 1973), cert. denied, 416 U.S. 960 (1974).

not use that information ... without incurring an affirmative duty to disclose." 588 F.2d at 1365 (emphasis in original).

In considering the substantive reach of Rule 10b-5 for the first time, this Court reversed the Second Circuit's Chiarella decision, and held that mere possession of material nonpublic information did not impose an obligation to disclose or a duty to refrain from trading. 445 U.S. at 235. Rather, the Court held that silence accompanying trading does not constitute fraud under the securities laws unless there exists "a duty to disclose arising from a relationship of trust and confidence between the parties to a transaction." Id. at 230. This Court concluded that it could not affirm the petitioner's conviction without recognizing a "general duty" between all participants in market transactions to forgo actions based on

material, nonpublic information," 445 U.S. at 233 -- recognition which the Court would not undertake absent explicit evidence of congressional intent. Id.[4]

Similarly, in 1983, the Supreme Court addressed the issue of "tippee liability," and the holding of Chiarella was extended to cover the tippees of insiders. In Dirks v. SEC, 463 U.S. 646, 654 (1983), this Court noted that "[n]ot 'all breaches of fiduciary duty in connection with a securities transaction' come within the ambit of Rule 10b-5." Id. (quoting Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 472 (1977)).[5]

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[4]This Court, in Chiarella, specifically refused to rule on the merit of the misappropriation theory as an alternative basis for affirmance, holding that such a theory of conviction had not been submitted to the jury. 445 U.S. at 236.

[5]Indeed, this Court wrote that "in a statutory area of the law such as securities regulation, where legal principles of general application

(footnote continued)

A tippee may assume a fiduciary duty to shareholders of a corporation not to trade on material nonpublic information "only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." Id., 463 U.S. at 660. Moreover, the Court observed that "a violation [of section 10(b)] may be found only where there is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.'" Dirks v. SEC, 462 U.S. 646, 663 n. 23 (1983) (quoting Hochfelder, 425 U.S. at 199).

Petitioner was convicted of securities fraud under a theory -- the misappropriation theory -- which departs from the dictates of

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must be applied ... behavior that may fall below ethical standards of conduct" is not always illegal. 463 U.S. at 661, n. 21.

Chiarella and Dirks, and which evenly split this Court in its most recent analysis of the issue.[6] This theory was first advanced in United States v. Newman, 664 F.2d 12 (2d Cir. 1981), cert. denied, 464 U.S. 863 (1983), where the government alleged that employees of two investment houses had breached the trust and confidence of their employers, and violated Rule 10b-5, by misappropriating confidential information of corporate clients, and trading on this information. The Second Circuit reversed the district court's dismissal of the complaint, holding that the defendants' "conduct ... could be found to constitute a criminal violation of Section 10(b) and Rule 10b-5 ...." Newman, 664 F.2d at 16. Three years later, in SEC. v. Materia, 745 F.2d 197 (1984), a copyreader employed by a financial printer, was convicted of

[6]See Carpenter v. United States, 108 S.Ct. 316 (1987).

securities fraud for trading on information divined from confidential information entrusted to his employer. 745 F.2d at 202. Most recently, in United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986), aff'd in part, aff'd by an equally divided court in part, 108 S.Ct. 316 (1987), a divided Court affirmed the conviction of a Wall Street Journal reporter who had revealed the prepublication schedule and contents of a Journal article to a broker-dealer, who in turn traded on this information and shared the profits with the reporter. In sum, in Carpenter the Second Circuit wrote:

> Thus, because of his duty of confidentiality to the Journal, defendant Winans -- and Felis and Carpenter, who knowingly participated with him -- had a corollary duty which they breached, under section 10(b) and Rule 10b-5, to abstain from trading in securities on the basis of the misappropriated

> information or to do so only upon making adequate disclosure to those with whom they traded.

791 F.2d at 1034.[7]

The misappropriation theory, as announced in Newman, Materia, and Carpenter, and applied in the present case, departs from Supreme Court precedent in two fundamental ways. First, it "presupposes that the misappropriation of market-sensitive information from an employer, combined with subsequent trading in the securities market on the basis of the information, satisfies the requirements for Rule 10b-5 liability, regardless of whether any fiduciary relationship exists between the misappropriator and a market participant."

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[7]In dissent, Judge Miner noted that "[w]hile the proscription of fraudulent and deceptive practices in connection with the purchase and sale of securities is a broad one, it never was intended to protect the reputation or enforce the ethical standards of a financial newspaper." 791 F.2d at 1037 (Miner, J., dissenting).

Insider Trading and the Misappropriation Theory, supra, at 102. Moreover, the theory imposes a general duty to disclose or abstain from trading, a duty which was specifically rejected by the Supreme Court in its Chiarella decision.[8]

Similarly, the theory, as applied in the instant case, turns the Supreme Court's decision in Dirks on its head.

> Under Dirks, a tippee's liability for trading on the basis of material nonpublic information is dependent on his having received the information from a tipper who breached a fiduciary duty by revealing the information for personal gain. Utilizing the misappropriation theory to impose liability upon tippees ignores the personal gain requirement since the insider, whether it be an investment banking firm or a

[8]"We know of no rule of law ... that a purchaser of stock, who was not an 'insider' and had no fiduciary relationship to a prospective seller, had any obligation to reveal circumstances that might raise a seller's demands and thus abort the sale." Chiarella, 445 U.S. at 232, n. 14 (citations omitted).

> financial newspaper, has no motive of personal gain in revealing the information.

Insider Trading and the Misappropriation Theory, supra, at 105-06.

There was never any allegation, in the instant case, that that alleged "tipper" -- whether it be Petitioner's law firm or its client -- benefited, or had a motive to benefit, from the "tip," as required in Dirks. Dirks, 463 U.S. at 662-64. As one observer has noted, "such an expansive application of Rule 10b-5 fails to provide adequate notice as to which trading activities violate securities laws." Insider Trading and the Misappropriation Theory, supra, at 106.

This case presents an opportunity to resolve the incontrovertibly important issue left open by this Court's split decision in Carpenter. The writ of certiorari should therfore be granted.

POINT III

CONFIDENTIAL INFORMATION ABOUT A CORPORATION'S PROPOSED RECAPITALIZATION ENTRUSTED TO A LAW FIRM BY A CLIENT FOR THE LIMITED PURPOSE OF ALLOWING THE FIRM TO RENDER LEGAL ADVICE IS NOT "PROPERTY" OF THE LAW FIRM OR CLIENT WITHIN THE MEANING OF THE MAIL FRAUD STATUTE WHERE THE WAS NOT INFORMATION GATHERED OR DEVELOPED BY THE CLIENT OR THE LAW FIRM, WHERE NEITHER THE CLIENT NOR THE LAW FIRM HAD THE RIGHT TO USE THE INFORMATION FOR ANY COMMERCIAL PURPOSE, AND WHERE THE ONLY HARM WHICH MIGHT ARISE FROM MISAPPROPRIATION OF THE INFORMATION WAS INJURY TO THE LAW FIRM'S REPUTATION

In McNally v. United States, 107 S.Ct. 2875 (1987), this Court held that the mail fraud statute, 18 U.S.C. §1341, protects only property rights, not intangible rights such as the right of citizens to have their state's affairs conducted honestly. In Carpenter v. United States, 108 S.Ct. 316 (1987), the Court

held that, while McNally removed intangible rights from the scope of the mail fraud statute, intangible property rights were still within the statute's scope. Specifically, the Court held that confidential business or commercial information -- in that case, the publication schedule and contents of the Wall Street Journal's "Heard on the Street Column" -- though intangible, was nevertheless property protected by the federal mail fraud law.

The question which this case presents is which intangible rights are "property" interests (and thus within the statute's protection) and which intangible rights are "non-property" interests outside its scope. A host of recent decisions demonstrates that this question, irrelevant before McNally and Carpenter but crucial in the aftermath of those two decisions, demands an answer from

this Court. The decisions of the lower courts are increasingly in disarray, and federal law has become unacceptably uncertain. See, e.g., United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987) (union official's failure to turn over a bribe to the union was a property deprivation under McNally); United States v. Richerson, 833 F.2d 1147 (5th Cir. 1987) (employee's concealment of material information from his employer causes property harm because the employer does not receive the property for which he paid); United States v. Ochs, 842 F.2d 515 (1st Cir. 1988) (disapproving Richerson and Runnels); United States v. Murphy, 836 F.2d 248 (6th Cir. 1988) (state's right to control or object with respect to issuances of a bingo permit does not constitute property right of the state, although, once issued, permit would be property of holder); United States v.

Baldinger, 838 F.2d 176 (6th Cir. 1988) (right to conduct business free of false information concerning status of associate's polygraph license not a property interest); United States v. Evans, 844 F.2d 36 (2d Cir. 1988) (right to control future arms sales is not a property right).

This case involves confidential information developed by Colt Industries, Inc. but divulged to its Pension Plan and, by the Plan, to the Plan's lawyers for the sole and exclusive purpose of allowing the Plan to obtain legal advice. The precise question which this case presents is whether such information is "property" of the Pension Plan or of the law firm so that its misappropriation constitutes interference with a property right even though the misappropriation in no way interferes with the client's or law firm's ability to use the

information for the purpose for which it was entrusted to them and even though the only harm alleged or shown is potential injury to the law firm's reputation because of its inability to keep confidential information confidential.

In this case, the Court of Appeals, relying on Carpenter, essentially held that all business-related information is the property of its holder, regardless of the nature of the information, the circumstance under which the holder obtained it, or the nature or scope of the holder's right to exploit it. In so doing, it ignored every one of those factors which led this Court to conclude that the information at issue in Carpenter, though intangible, was "property" of the Wall Street Journal: the fact that the information was the stock in trade of the paper, gathered at the cost of enterprise,

organizations, skill, labor and money to be sold to others, like any other merchandise, and the fact that the misappropriation interfered with the Journal's right to exclusive use of the information.

Petitioner contends that whatever "interest" Kramer, Levin had in the confidential information entrusted to it was not a property interest which Petitioner violated. What may have been violated was its non-property interest (i.e., its desire) to keep the information confidential. This interest or desire was a function of its ethical responsibilities and of its desire to protect its reputation. Under this Court's decisions, however, neither one's interest in one's reputation, Paul v. Davis, 424 U.S. 693, 712 (1976), nor an interest in an employee's faithful service, see McNally v. United States, supra, is a property interest

protected by the mail fraud statute. (Nor, even if it were, is it the "interest" Petitioner is alleged to have misappropriated.)

As the reported cases show, schemes to defraud may assume almost an infinite variety of forms and the types of interests such schemes can affect are equally varied. This Court's decisions in Carpenter and McNally have rendered it essential to differentiate between "property" interests and "non-property" interests in a context where those concepts were never before relevant. While common law definitions may help elucidate the meaning of "property" under McNally, legal definitions developed for one purpose cannot always be used for another. The lower courts will therefore continue to confront this question, and will continue to reach

disparate, irreconcilable conclusions. The uncertainty to which Carpenter and McNally have given rise is unacceptable.

The petition for a writ of certiorari should be granted.

POINT IV

A DEFENDANT IS ENTITLED TO ACCESS TO ADMITTEDLY EXCULPATORY GRAND JURY TESTIMONY OF AN ALLEGED CO-CONSPIRATOR WHO DOES NOT TESTIFY AT TRIAL BUT WHOSE HEARSAY STATEMENTS INCULPATING THE DEFENDANT ARE INTRODUCED THROUGH ANOTHER WITNESS

This case presents the important question whether the rule of Brady v. Maryland, 373 U.S. 83 (1963), is violated where the prosecutor possesses, but refuses to disclose, transcripts of exculpatory grand jury testimony merely because the defendant has been advised that the testimony was exculpatory and can speak to the grand jury witness about his testimony. Relying on a line of Second Circuit cases holding that Brady does not require the government to hand over exculpatory evidence "if the defendant knew or should have known the essential facts permitting him to take advantage of any

exculpatory testimony," the Court of Appeals rejected Petitioner's claim that he was entitled to the transcripts. (A-15)

Petitioner was convicted largely on co-conspirator hearsay evidence presented through the testimony of David Lev, himself a convicted perjurer, who testified about conversations he allegedly had with his mentally unbalanced brother, Shimon Lev, who was not called to testify for the prosecution. According to David Lev, in those conversations Shimon Lev inculpated Petitioner. At the same time the government (but not the jury) well knew that, in sworn grand jury testimony given under a grant of immunity, Shimon Lev had contradicted David Lev's claims and had exculpated Petitioner.

This Court has indicated that one reason why the admission of co-conspirator hearsay does not violate defendant's rights is that

Rule 806 of the Federal Rules of Evidence permits a defendant to impeach the hearsay declarations of alleged co-conspirators. Bourjaily v. United States, 107 S.Ct. 2775, 2781 (1987). If the guarantee is to be meaningful, the Brady rule must extend to sworn grand jury testimony of the alleged co-conspirators which directly contradicts his hearsay statements.

Certiorari should be granted to consider this important question.

CONCLUSION

For the above-stated reaons, the writ of certiorari should be granted.

Respectfully submitted,

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, New York 10007
(212) 513-7676

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Attorneys for Petitioner
Israel G. Grossman

Dated: August 5, 1988
New York, New York

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 777—August Term, 1987

(Argued February 19, 1988 Decided March 25, 1988)

Docket No. 87-1419

UNITED STATES OF AMERICA,

Appellee,

—v.—

ISRAEL G. GROSSMAN,

Appellant.

Before:

TIMBERS, KEARSE and MAHONEY,

Circuit Judges

Appeal from a judgment entered September 15, 1987 in the Southern District of New York, Richard Owen, *District Judge*, convicting appellant on nineteen counts of securities fraud and nineteen counts of mail fraud.

Affirmed.

ALAN M. DERSHOWITZ, Cambridge, Mass. (Mark D. Cahn, Victoria B. Eiger, Nathan Z. Dershowitz, and Dershowitz & Eiger, New York, N.Y., on the brief), *for appellant*.

ROBERT GAGE, Assistant United States Attorney, New York, N.Y. (Rudolph W. Giuliani, United States Attorney, Celia Goldwag Barenholtz and John F. Savarese, Assistant United States Attorneys, New York, N.Y., on the brief), *for appellee*.

TIMBERS, *Circuit Judge*:

Appellant Israel G. Grossman appeals from a judgment entered September 15, 1987 in the Southern District of New York, upon a jury verdict, Richard Owen, *District Judge*, convicting appellant on (1) nineteen counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) (1982), 78ff (1982 & Supp. IV 1986) and 17 C.F.R. § 240.10b-5 (1987); and (2) nineteen counts of mail fraud, in violation of 18 U.S.C. §§ 2 and 1341 (1982).

On appeal, Grossman claims principally that he was not given enough time to prepare for trial on a superseding indictment which was returned two business days before trial; and that he should have been given allegedly exculpatory grand jury testimony. Other subordinate claims are raised.

We hold that the district court did not abuse its discretion in denying Grossman's motion to dismiss the super-

seding indictment or in failing to grant a continuance to prepare for trial on the superseding indictment. We also hold that the government was not obliged to provide Grossman with the grand jury testimony.

We affirm.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

At the time of the events in question, Grossman was an associate in the Manhattan law firm of Kramer, Levin, Nessen, Kamen & Frankel ("Kramer Levin" or "the firm"). He became associated with Kramer Levin in October 1984 and worked in its pension department which consisted of two partners and five associates.

On July 9, 1986, attorneys in the pension department of Kramer Levin were retained by the trustees of a pension plan known as the Retirement Savings Plan for Salaried Employees (the "Plan"), of Colt Industries, Inc. ("Colt"). The Plan retained Kramer Levin to represent it in connection with a proposed recapitalization of Colt scheduled for July 20, 1986. Under the recapitalization, each Colt shareholder except the Plan would redeem their common stock in exchange for a cash payment of $85 per share and one share in the recapitalized company. A share in the recapitalized company was expected to have a value of $15. The Plan, which held about seven percent of Colt's stock, would receive no cash but instead would receive an equivalent number of shares in the recapitalized company. Public announcement of the proposed recapitalization was expected to cause Colt's stock to rise dramatically.

Starting on July 9, 1986 and continuing until the recapitalization was announced, Kramer Levin attempted to keep information of the recapitalization confidential. On drafts of documents and in correspondence, it used a code name for the matter or omitted the client's name and dollar amounts. It established the policy of not letting others in the firm know of the matter except on a "need-to-know" basis.

Kramer Levin also periodically circulated to its attorneys a general memorandum on its confidentiality policy. This memorandum stated that attorneys receiving information from clients could not use that information for trading and could not give it to anyone else for any purpose. Kramer Levin circulated this confidentiality memorandum several times while Grossman was an associate. The last time the firm circulated the memorandum prior to the Colt transaction was November 1, 1985.

On July 10, 1986 (the day after the Plan retained Kramer Levin), Michael Nassau, the senior partner in the pension department, met with several attorneys in the department (not including Grossman), and briefed them on the Colt recapitalization. Martin Fleischer was one of the associates at the meeting.

That same evening, Grossman went to Fleischer's office and asked him if he was working on the new transaction Grossman had been hearing about. Fleischer said he was. In response to further questions from Grossman, Fleischer told him almost everything about the recapitalization, including the estimated value of the new shares; the amount of cash per share to be given to the shareholders; and the identity of "the others involved". At trial, Fleischer was unsure whether he divulged to Grossman the name of the client; he testified that he did not recall his response when

Grossman asked him the client's name. Fleischer also testified that Grossman had visited him only five other times in the year and a half they had worked together.

The events that occurred subsequent to the meeting between Fleischer and Grossman are in dispute. Substantial circumstantial evidence, however, in particular Kramer Levin's telephone records, indicates that, starting with that same evening of July 10, 1986, Grossman (or someone using his office phone) began placing numerous phone calls to Grossman's friends and relatives (the "relatives", collectively). Fifty calls were made between July 10, and July 16, 1986. Grossman made 20 calls to his uncle, George Hirshberg; 7 calls to his cousin, Walter Herzberg; 5 calls to another cousin's husband, Shimon Lev; 3 calls to Shimon Lev's friend and business partner, Norman Stein; 3 calls to Grossman's brother-in-law, Saul Listokin; and 12 calls to Listokin & Sons ("L & S"), Listokin's company.

Also starting on July 10, someone frequently called from Grossman's office two discount brokerage firms, Whitehall Securities ("Whitehall") and Datek Securities ("Datek"). Grossman had no accounts at these firms, but Listokin and Stein did. These calls, 14 in all, frequently were made before or after calls to L & S or Stein. Moreover, the person in Grossman's office made calls that coincided precisely with the placement of orders to purchase Colt call options. Peter Gamby was the president of Whitehall and the person who received the calls from Grossman's office. He testified that, upon receiving phone orders, it was his practice (1) to put an investor on hold and time-stamp the order; (2) to execute the order and time-stamp it again; and (3) to take the investor off hold to confirm that the order had been placed. Telephone records

and Gamby's time-stamps indicated that Whitehall placed the orders during the exact times when it was receiving calls from Grossman's office.

During the periods immediately preceding and following the July 10-16 period, Grossman placed no phone calls to any of these tippees or brokerage firms, except for 3 calls to Saul Listokin and 16 to L & S.

All of the relatives made massive purchases of Colt "out-of-the-money" call options over the next few days—i.e., between July 11 and July 18, 1986.[1] For example, they purchased over 80% of "August 80" options (options expiring in August and with a strike price of $80)—the most speculative category of option. None of the relatives had purchased Colt securities before, and none sought advice from their brokers regarding their purchases.

The government asserts that Grossman made the purchases for Listokin, both over the phone and once in person at Whitehall. While the evidence is inconclusive, it does show that on July 14, 1986 someone identifying himself as Listokin entered Whitehall and met with Gamby, its president. He purchased options for the benefit of Saul Listokin, and signed the necessary forms. Someone identifying himself as Listokin telephoned Gamby later to change the name of the beneficiary. Gamby sent new forms to Listokin's address, and received them back signed after a few days. Handwriting analysis showed the signature on the second set of forms was Listokin's but the

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1 An "out-of-the-money" call option allows a person purchasing the option to buy stock during a limited period in the future at a fixed price (the "strike price"). That price is higher than the current market price. Thus, the option holder essentially is betting that the market price will rise over the strike price within the limited time period. The time limitations make such investments extremely speculative.

signature on the first set was not. Neither the government nor Grossman used the results of the comparison of Grossman's handwriting with the signature on the first set of forms. Upon reviewing a set of photographs, including Listokin's but not Grossman's, Gamby was certain that his July 14 visitor was not among them. Moreover, upon being shown a second set of photographs, including Grossman's, Gamby said two of them (one of Grossman) resembled his visitor. Neither the government nor Grossman used this evidence at trial.

On July 20, 1986, Colt made its recapitalization public and, as expected, its share price increased dramatically. On July 18, 1986, before the announcement, the price was $66.75 per share; on July 20, 1986, the price reached $93.62 per share. Thus, on a total investment of $33,000, the relatives were able to realize a total profit of $1,470,000. The Listokin purchases were sold at a loss on July 17 and 18, before the recapitalization was announced. Purchases for Hirschberg, however, more than covered this loss.

The events following the announcement of the recapitalization were proved at trial primarily through the testimony of David Lev, Shimon Lev's brother. David testified about several conversations between Shimon and himself and between Norman Stein and himself. According to David's testimony, Shimon told David that he had "made it big" by purchasing options on a tip from his "cousin Grossman". Shimon told David that he had become concerned about an investigation into his trading in Colt and that he wanted David to become the nominal owner of his call options (which had been purchased through Datek by Stein for Shimon's benefit). David had been in Israel between July 3 and July 23, 1986. Shimon therefore believed

that David had an alibi for the time period when he could have received tips or made purchases. David agreed to become the nominal owner of Shimon's call options. Accordingly, in August 1986, Stein transferred cash from his Datek account to David's bank account. Moreover, Stein drew two checks on the proceeds of the Colt options and gave the checks to David who deposited them in his account.

Shimon subsequently told David that he owed Grossman $45,000 or $56,000 as Grossman's share of the Colt transaction. Shimon said that Grossman would accept $25,000 as his share in recognition of the fact that David would have to pay taxes on the capital gains. David gave Shimon a check for $25,000 with the payee left blank. Shimon, apparently in an attempt to launder the payment, made the check payable to Bnos Rochel, a charity from which, as he told David, he believed he could get cash.

On July 30, 1986, the SEC informed Kramer Levin that it was investigating the Colt transaction and requested the names of all those at the firm who knew of the transaction. Max Schwartz, a Kramer Levin partner, sent a memorandum to the attorneys who had worked on the transaction and asked that they identify anyone else who knew of it. Upon receiving this memorandum, Fleischer told Schwartz that he had told Grossman about the matter. Schwartz included Grossman's name on the list he sent the SEC.

On February 17, 1987, Grossman was arrested. On March 17, 1987, he was indicted (in the "first indictment") which charged him with twelve counts of securities fraud and twelve counts of mail fraud. The securities fraud counts charged Grossman with misappropriating confidential, non-public, information from Kramer

Levin. The mail fraud counts charged him with devising a fraudulent scheme to trade in Colt options using confidential information and causing mail to be delivered for the purpose of executing the scheme. The charges were based on events which occurred between July 11 and July 18, 1986.

Grossman moved to dismiss the first indictment, asserting among other things that it failed to state a crime; that it failed to state that he personally benefitted from the fraud; and that the misappropriated information was not "non-public". By an order entered June 26, 1987, Judge Owen denied the motion, although he observed that the charges in the indictment were extremely bare.

On July 23, 1987, the government sent Grossman's counsel a letter notifying them that Shimon Lev might have exculpatory information. Shimon had testified before the grand jury on April 23 and July 14, 1987 under a grant of immunity. The government later refused to turn over Shimon's grand jury testimony to Grossman.

On July 29, 1987, the court held a pre-trial conference. At this conference the government informed the court that during the preceding week it had notified Grossman's counsel that it planned to seek a superseding indictment, and that it had told Grossman's counsel of the contents of the planned superseding indictment. On Thursday, July 30, 1987, two business days before the trial was scheduled to begin, a superseding indictment (the "superseding indictment") was returned. The superseding indictment contained 38 counts, including 10 counts involving new transactions. These transactions concerned Listokin, whom the first indictment did not mention. Moreover, the superseding indictment expanded the time frame of the charges; while the first indictment covered only the week

of July 11-18, 1987, the superseding indictment covered a period longer than one year, from July 9, 1986 to July 30, 1987. The superseding indictment was filed on July 30, 1987. Grossman's motion to dismiss the superseding indictment was denied.

After a jury trial between August 3 and August 18, 1987, Grossman was convicted on all charges. He was sentenced on September 15, 1987 to concurrent two year prison terms on each of counts one through ten and twenty through thirty. He was fined $25,000. The court suspended Grossman's prison sentences on counts eleven through nineteen and thirty-one through thirty-eight. Grossman was placed on probation for five years upon release from prison. A $50 statutory assessment on each of the counts was imposed. Grossman currently is serving his prison sentence.

From the judgment of conviction, this appeal was taken.

II.

Grossman claims that the court erred in permitting the superseding indictment to be returned two business days before the trial was scheduled to begin. He cites *United States* v. *Wilks*, 629 F.2d 669, 672 (10 Cir. 1980), for the proposition that a superseding indictment may be returned any time before trial, absent prejudice to the defendant. He then asserts that he was prejudiced in several ways in this case. Assuming arguendo that Grossman is correct that a court may permit a superseding indictment to be returned only in the absence of prejudice to the defendant, his argument fails because the superseding indictment here

did not change substantially the nature of the government's case and caused no such prejudice to Grossman.

Grossman asserts essentially four claims of prejudice. First, he argues chiefly that the superseding indictment expanded the time frame of the charges and thereby allowed the government, through the testimony of David Lev, to introduce the co-conspirator statements of David and Shimon Lev and Norman Stein. He says that these statements were made after the July 11-18 period described in the first indictment and thus would not have been admissible under that indictment. He then asserts that he was prejudiced because these statements, which concerned in part Shimon Lev's plan to pay Grossman $25,000 for Grossman's share in the profits, provided the only evidence that Grossman personally benefitted from the scheme.

We find this argument to be frivolous. As the government succinctly points out, this evidence would have been relevant under the first indictment. Specifically, it would have been relevant under Fed. R. Evid. 401 because such evidence—including the evidence of Shimon Lev's intention to pay Grossman $25,000—tended to prove Grossman's motive and fraudulent intent which were disputed issues at trial. In the language of Rule 401, such evidence concerned facts that were "of consequence to the determination of the action." *See, e.g., United States v. Tager*, 788 F.2d 349, 352-53 (6 Cir. 1986) (evidence of previous unpaid tax judgment relevant to show intent and motive for securities fraud).

Grossman attempts to respond to this claim of the government by arguing that the superseding indictment at least "eased" the way for the introduction of the co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). He asserts that Rule 801(d)(2)(E) requires that co-

conspirator statements be made in furtherance of and during the course of a conspiracy in which the defendant was involved; that the statements in question here were made after the time frame of the first indictment had ended; that it was "hardly a forgone conclusion" that the district court would have admitted the statements under the first indictment; and that any presumption drawn in such a case should operate in the defendant's favor.

This reasoning strikes us as a smoke screen. It simply does not address the original flaw in Grossman's argument, namely, that the co-conspirator statements would have been *equally* admissible (or inadmissible) under either indictment because they were *relevant* under each. Whether they were admissible under Rule 801(d)(2)(E) is a concern entirely separate from the issue in the instant case. The sole issue here is whether the superseding indictment unfairly put Grossman in a worse position than had the first indictment. We conclude that it did not put him in a worse position. The expanded time frame of the superseding indictment did not in any way "ease" admission under Rule 801, because the government was not required to "charge a conspiracy to take advantage of Fed. R. Evid. 801(d)(2)(E)." *United States* v. *Stratton*, 779 F.2d 820, 829 (2 Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986). "The Government merely needs to demonstrate that the declarant and the defendants against whom the statements are offered are members of a conspiracy in furtherance of which the statements are made, and that this conspiracy is 'factually intertwined' with the *offenses* being tried." *Id.* (citations omitted) (emphasis added) (quoting *United States* v. *Lyles*, 593 F.2d 182, 194 (2 Cir.), *cert. denied*, 440 U.S. 972 (1979). Thus, the indictment did not have to state explicitly the exact time frame that would become relevant at trial, as long as any co-conspirator statements the

government used were derived from a conspiracy that was "factually intertwined" with the offenses stated in the indictment.

In the instant case, Shimon Lev's statements about paying Grossman his share of the Colt profits undoubtedly were "factually intertwined" with "the offenses being tried", i.e., Grossman's misappropriation and dissemination of confidential information to generate those same Colt profits. More important, however, is the fact that the statements were *equally* "intertwined" with the offenses charged under either the first indictment or the superseding indictment. The government did not charge conspiracy under either indictment; the statement would have been equally admissible (or inadmissible) under either indictment; and thus the superseding indictment could not have prejudiced Grossman in the way claimed.

Second, Grossman argues that the superseding indictment prejudiced him because it failed to give him timely notice that he would have to explain Shimon Lev's statements about his plan to pay Grossman $25,000 or defend himself on the trades of his brother-in-law, Saul Listokin, which had not been included in the first indictment. He asserts that, had he been given earlier notice, he would have (1) attempted to identify the person who met with Gamby at Whitehall; (2) attacked the accuracy of the Kramer Levin telephone records; and (3) attempted to contact Bnos Rochel, the charity which Shimon Lev said he could use to launder the $25,000 payment to Grossman. Each of these assertions is without merit since Grossman in fact did have notice that these matters would be raised at trial. In April 1986, three months before the superseding indictment was returned, the government provided Grossman with full discovery regarding the Listokin trades, including

the telephone records. Grossman therefore both knew that the government would be using the Listokin trades at trial and had the opportunity to attack the telephone records for accuracy. Grossman also knew that the SEC had included the Listokin trades in its civil proceeding against Grossman. While Grossman claims that this fact should be discounted because the government has no case authority for the proposition that notice of the SEC's allegations "was the equivalent of notice that [he] would have to defend against those allegations in a criminal proceeding", Grossman simply ignores the fact that the issue, even as he frames it, is whether he was prejudiced by the new indictment. Since he in fact had notice of the Listokin trades and the government's interest in them, we are satisfied that in this particular case the defendant was protected from prejudice.

Third, Grossman argues that he was prejudiced because it was not until the superseding indictment was returned that the government charged that he personally benefitted from the scheme. This argument fails to recognize that no indictment is required to charge that a defendant personally benefitted from a crime—an indictment "need do little more than to track the language of the statute charged and state the time and place . . . of the alleged crime". *United States* v. *Tramunti*, 513 F.2d 1087, 1113 (2 Cir.), *cert. denied*, 423 U.S. 832 (1975). Accordingly, Grossman can hardly have been prejudiced by the absence of this optional information in the first indictment.

Fourth, Grossman argues conclusorily that the superseding indictment was returned for vindictive reasons, referring apparently to Grossman's refusal to plead guilty. Grossman has produced no evidence whatsoever of vindictiveness and, although we strongly dispprove of the prose-

cutor's tardiness in preparing the superseding indictment, we find no evidence suggesting a vindictive motivation.

In short, the superseding indictment did not alter substantially the government's case against Grossman. Its return, even two days before trial, caused him no prejudice. We hold that the court did not abuse its discretion in refusing to dismiss the superseding indictment or in failing to grant Grossman a continuance.

III.

We turn next to Grossman's claim that he was entitled to the grand jury testimony of Shimon Lev which he says was exculpatory. He asserts that the government violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), when it refused to turn over Shimon's allegedly exculpatory grand jury testimony. Grossman claims that Shimon's testimony would have been admissible under Fed. R. Evid. 804(b)(1) (former testimony) and Fed. R. Evid. 806 (impeachment of hearsay declarant). We find this claim to be without merit.

No *Brady* violation occurred here because *Brady* does not require the government to turn over exculpatory evidence "if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence." *United States* v. *Gaggi*, 811 F.2d 47, 59 (2 Cir.), *cert. denied*, 107 S.Ct. 3214 (1987). The rationale for our rule is that *Brady* is designed to "assure that the defendant will not be denied access to exculpatory evidence *only known to the Government*." *United States* v. *Leroy*, 687 F.2d 610, 619 (2 Cir. 1982) (emphasis added), *cert. denied*, 459 U.S. 1174 (1983). Accordingly, the government had a duty to disclose only "information which

had been known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976). The government has no duty actually to turn over grand jury testimony where the defendant knows of the witness' identity; that the witness "might have testified before the grand jury"; and that "[the witness'] statements might have supported [the defendant's] defense." *LeRoy*, *supra*, 687 F.2d at 619.

LeRoy controls this case. Grossman knew of Shimon's identity. He had been informed specifically in the government's letter of July 23, 1987 that Shimon might have given the grand jury exculpatory evidence. While Grossman attempts to distinguish *LeRoy* on several grounds, none of the differences he asserts is significant—for example, the fact that LeRoy never explicitly asked the prosecution for the grand jury testimony does not change the analysis. While Grossman claims that he needed the actual transcripts of the grand jury testimony to impeach Shimon, his claim fails because, as stated above, he never raised his impeachment argument in the district court and therefore waived it.

We hold that the government was not obliged to provide Grossman with the grand jury testimony of Shimon Lev.

IV.

Grossman raises three other subordinate claims that warrant only brief mention: (1) that his mail fraud convictions should be reversed because Kramer Levin did not have a "property interest" in the misappropriated confidential information; (2) that his mail fraud convictions should be reversed because the mailings were merely "incidental" to his scheme to defraud; and (3) that the district

court should have instructed the jury to find whether Grossman knew of Kramer Levin's confidentiality policy and whether his disclosure would violate that policy. We find each of these claims to be frivolous.

First, Grossman says that the mail fraud statute, 18 U.S.C. § 1341 (1982),[2] protects only "property rights", *McNally* v. *United States*, 107 S. Ct. 2875, 2879 (1987), and does not protect intangible interests, such as the reputation of a business. He cites *Carpenter* v. *United States*, 108 S. Ct. 316 (1987), for the proposition that confidential business information will be "property" only when (1) the information is of commercial value to the holder of the information and that holder has exclusive right to exploit it; or (2) the holder of the information gathered it at the cost of its own "enterprise, organization, skill, labor and money." *Id.* at 321. Grossman then asserts that Kramer Levin had no "property interest" in the Colt confidential information because Kramer Levin (1) could not use the information for its commercial value or have the exclusive

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2 Section 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining *money or property* by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both."

18 U.S.C. § 1341 (1982) (emphasis added).

right to exploit it; and (2) did not gather the information through its own enterprise, organization, skill, labor and money. Grossman concludes that his mail fraud convictions should be reversed. We disagree.

His claim is specious and fails for several reasons. First, Grossman distorts *Carpenter*. In context, the language which he cites merely *describes* the confidential information in that case; it does not require that *all* confidential information must be of the same nature to be considered "property". *Id.* at 321. *Carpenter* actually holds generally that, even though "confidential business information" is intangible, it "has long been recognized as property." *Id.* at 320. Thus, the information in this case regarding the Colt recapitalization clearly falls within the definition of property under *Carpenter*. Second, the fact that Kramer Levin could not commercially exploit the information by trading on it does not mean the confidentiality of the information had no commercial value to the firm. As several partners of the firm testified, maintaining the confidentiality of the information was of commercial value because, by maintaining confidentiality, the firm would protect or enhance the firm's reputation, with the result that it would not lose its clients and perhaps would gain more clients.

Second, Grossman claims that the mail fraud convictions should be reversed because the mailings on which they were based were the mailings of confirmation slips from brokerage houses. He asserts that these mailings were only "incidental" to the fraud scheme and that the law requires that the mailings be "for the purpose of executing the scheme". *United States* v. *Lane*, 474 U.S. 438, 451 (1986); *see also United States* v. *Maze*, 414 U.S. 395, 400 (1974). Here, however, the mailings of the confirma-

tion slips *did* further the purpose of executing the scheme. The confirmation slips (1) notified the relatives that the purchase or sale actually had been completed; (2) provided an on-going tally of purchases, allowing the relatives to cover each other's positions; (3) concealed the fraud by maintaining an appearance of normality, *see United States* v. *Cohen*, 518 F.2d 727, 737 (2 Cir.), *cert. denied*, 423 U.S. 926 (1975); and (4) allowed the relatives to demonstrate ownership after the recapitalization announcement. *Pereira* v. *United States*, 347 U.S. 1 (1954).

Third, Grossman claims that the court should have charged the jury specifically to find whether he knew about Kramer Levin's confidentiality policy and whether his use of the confidential information would violate that policy. He theorizes that, since he was not on the team of attorneys who worked on the transaction, he might never have been told that information on the transaction was confidential and he might have thought that it was either public or not material. Grossman, however, did not object to the jury charge. Absent "plain error", therefore, he has waived this claim. *United States* v. *Arocena*, 778 F.2d 943, 948 (2 Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986); Fed. R. Crim. P. 30, 52(b).

We hold that the district court was not required to charge the jury on Grossman's specific knowledge of the confidentiality policy; and that, even if the court had so charged, the jury was unlikely to have accepted the theory that Grossman did not realize he was doing anything improper. We therefore hold that the trial judge did not commit plain error.

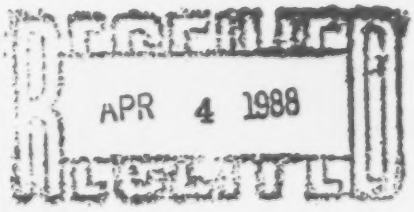
In short, having carefully considered all of Grossman's claims of error, including his subordinate ones, we hold that none has merit.

V.

To summarize:

We hold that the district court did not abuse its discretion in denying Grossman's motion to dismiss the superseding indictment and in failing to grant a continuance to prepare for trial under the superseding indictment. We also hold that the government was not obliged to provide Grossman with the grand jury testimony. We further hold that Grossman's subordinate claims of error are frivolous.

Affirmed.



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APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 9th day of May one thousand nine hundred and eighty-eight.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v

ISRAEL G. GROSSMAN,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the **appellant ISRAEL G. GROSSMAN,**

Upon Consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-976

ISRAEL G. GROSSMAN,

Applicant,

- v -

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 5, 1988.

/s/Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 24th
day of June, 1988.

(2)

Supreme Court, U.S.
FILED
OCT 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-232

In the Supreme Court of the United States

OCTOBER TERM, 1988

ISRAEL G. GROSSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
Assistant General Counsel

RANDALL W. QUINN
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

30 pp

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioner's request for a continuance when a superseding indictment was returned two business days before the scheduled trial date.

2. Whether petitioner violated the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, by fraudulently misappropriating confidential material information for use in securities trading.

3. Whether the confidential information that petitioner misappropriated constituted "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

4. Whether the government violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose the grand jury testimony of a co-conspirator who did not testify at trial but whose hearsay statements were admitted into evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-232

ISRAEL G. GROSSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 843 F.2d 78.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1988. A petition for rehearing was denied on May 9, 1988. On June 24, 1988, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including August 5, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 19 counts of securities fraud, in violation of 15

U.S.C. 78j(b) and 78ff, and 17 C.F.R. 240.10b-5. He was also convicted on 19 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of two years' imprisonment on ten of the securities fraud counts and 11 of the mail fraud counts, and he was fined a total of $25,000 on those counts. He was sentenced to five years' probation on the remaining counts, with the term of probation to begin upon his release from prison. The court of appeals affirmed (Pet. App. A1-A20).

1. Petitioner, an attorney, was an associate in the pension department of the law firm of Kramer, Levin, Nessen, Kamen & Frankel (Kramer Levin) in New York City. On July 9, 1986, Kramer Levin was retained by the Trustees of the Retirement Savings Plan for Salaried Employees of Colt Industries, Inc., to represent the pension plan in connection with a proposed $1.5 billion recapitalization of Colt. The proposal contemplated that Colt shareholders, with the exception of the pension plan, would redeem their common stock in exchange for a cash payment of $85 per share and newly issued shares in the recapitalized company expected to be worth $15 per share. The pension plan, which held about seven percent of Colt's common stock, would not receive cash when it redeemed its shares but instead would receive an equivalent number of shares in the recapitalized company. Public announcement of the recapitalization, which was set for July 20, 1986, was expected to cause a dramatic rise in the price of Colt's stock. Pet. App. A3.

After being retained, Kramer Levin represented the pension plan through the public announcement of Colt's recapitalization. In the course of rendering its legal services, Kramer Levin advised the plan on its obligations with respect to the proposed recapitalization, and it assisted in determining whether Colt's recapitalization proposal provided the pension plan with value equivalent to the con-

sideration that public shareholders were to receive upon redeeming their shares. During that time, Kramer Levin attempted to keep information about the recapitalization confidential by using code names for the matter and by omitting the client's name and dollar amounts on drafts of documents and correspondence. The firm also established a policy of not letting others in the firm know about the matter except on a "need-to-know" basis. In addition, the firm periodically circulated to its attorneys a memorandum stating that attorneys who received information from clients were forbidden to use it for trading or to give it to any other person. The memorandum had been circulated several times while petitioner worked at Kramer Levin, and the most recent circulation prior to July 1986 was in November 1985. Pet. App. A4.

When Colt publicly announced the recapitalization on July 20, 1986, its share price, as expected, rose dramatically. On July 18, 1986, two days before the announcement, the price was $66.75 per share. On the day of the announcement, the price climbed to $93.62 per share. Pet. App. A7.

2. On March 17, 1987, a grand jury sitting in the Southern District of New York returned a 24-count indictment charging petitioner with 12 counts of securities fraud and 12 counts of mail fraud relating to transactions in Colt stock options. The securities fraud counts alleged that, between July 11 and July 18, 1986, petitioner misappropriated confidential, nonpublic material information from Kramer Levin and its client, the Colt pension plan, regarding the imminent Colt recapitalization plan and passed it on to two relatives and a friend—George Hirschberg, Walter Hertzberg, and Norman Stein—who used the information to purchase Colt call options and thereby made a substantial profit. The companion mail

fraud counts charged that petitioner devised a fraudulent scheme to trade in the Colt options using the misappropriated confidential information and caused broker confirmation slips to be delivered through the mail for the purpose of executing the scheme. Pet. App. A8-A9.

At a pretrial conference on July 29, 1987, the district court was told that during the preceding week the government had notified petitioner's counsel that it planned to seek a superseding indictment and that it had told petitioner's counsel the contents of the anticipated superseding indictment. On Thursday, July 30, 1987, with the trial scheduled to begin on the following Monday, the grand jury returned the superseding indictment, which added 14 new counts and covered the period from July 9, 1986, to July 30, 1987. Pet. App. A9-A10.

Four of the new counts were mail fraud charges based on mailings of broker's confirmation slips for certain purchases of Colt call options that had been charged in the original indictment. The other ten new counts consisted of five securities fraud counts and five mail fraud counts. Those charges were based on five transactions involving purchases (four of Colt call options, one of Colt common stock) for the account of petitioner's brother-in-law, Saul Listokin—transactions that had been under investigation for nearly a year by the Securities and Exchange Commission (SEC) in a parallel civil proceeding.[1] The superseding indictment also added a sentence alleging that not only petitioner's family but petitioner himself received a finan-

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[1] On July 30, 1986, the SEC informed Kramer Levin that it was investigating the Colt transaction. When the SEC requested the names of all persons at the firm who knew about the transaction, Kramer Levin identified petitioner as one of those persons. The SEC subsequently initiated a civil fraud proceeding against petitioner, *SEC* v. *Grossman*, 87 Civ. 1031 (SWK) (S.D.N.Y. Feb. 17, 1987).

cial benefit from his misappropriation of the confidential information. When petitioner subsequently moved to dismiss the superseding indictment on the first day of trial, the district court denied the motion. Pet. App. A9-A10.

3. a. The evidence at trial showed that petitioner learned of the Colt recapitalization proposal on July 10, 1986, the day after Kramer Levin was retained to represent the pension plan. That day, the senior partner in the pension department met with several attorneys and briefed them on the Colt proposal. Petitioner was not at the meeting. Martin Fleischer, an associate who did attend the meeting, was assigned to analyze Colt's proposal and was therefore provided with the key financial details. That same evening, petitioner, having heard of the new matter, went to Fleischer's office and asked him if he was working on it. When Fleischer replied that he was, petitioner asked him about the nature of the transaction. Fleischer responded by telling petitioner the details of the recapitalization, including the estimated value of the new shares, the amount of cash to be paid the shareholders, and the identities of the others involved. At trial, Fleischer did not recall whether he told petitioner the name of the client. Pet. App. A4-A5.

Within hours of learning that Colt stock would increase in value following the recapitalization, petitioner (or someone using his office telephone) began making a series of calls to petitioner's relatives and a friend (Pet. App. A5). Between July 10 and July 16, 1986, petitioner placed 20 calls to his uncle, George Hirschberg; seven calls to his cousin, Walter Hertzberg; five calls to another cousin's husband, Shimon Lev; and three calls to Shimon Lev's friend and business partner, Norman Stein. In the days immediately following those telephone calls, petitioner's relatives and Stein purchased unusually large quantities of

Colt "out of the money" call options.[2] None of the individuals whom petitioner tipped had purchased Colt securities before, and all of them purchased the options without seeking or in contravention of their brokers' advice. After Colt's recapitalization was made public on July 20, 1986, petitioner's relatives and Stein realized a profit of $1,470,000 on an investment of $33,000. Pet. App. A5-A7.

Between July 10 and July 16, 1986, petitioner placed three calls to his brother-in-law, Saul Listokin, and 12 calls to Listokin's company, Listokin & Sons (L & S). During the same period, petitioner also made a series of telephone calls to Whitehall Securities and Datek Securities, discount brokerage firms with which petitioner had no account. Those calls frequently were made just before or just after petitioner placed calls to Listokin or to L & S. Three of petitioner's calls to the brokers coincided precisely with their placement of orders to purchase large quantities of Colt call options for Listokin's account. In

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[2] An "out of the money" call option entitles its holder to buy stock during a fixed period in the future at a set "strike price" that is higher than the current market price. For example, Colt "August 80" call options entitled their holders to purchase, on or before August 15, 1986, shares of Colt common stock at a strike price of $80 per share. When the price of Colt's stock rose to $93.62 per share after the public announcement of the recapitalization on July 20, 1986, those options accordingly became very valuable.

A call option purchaser is, in effect, speculating that the market price of the underlying security will rise over the strike price on or before the option's expiration date. If the price rises as hoped, "out of the money" call options can provide enormous profits on relatively small investments.

addition, there was evidence showing that petitioner went to Whitehall's offices during that same period and opened an account in the name of Listokin, although the account beneficiary was changed to Listokin & Sons Pension Plan over the telephone later that day. The options bought in the name of Listokin were sold on July 17 and 18, 1986, before the recapitalization of Colt was announced, but the losses incurred were more than covered by profits on purchases made the same days for the account of petitioner's uncle, George Hirschberg.[3] Pet. App. A5-A7.

b. The events following the public announcement of Colt's recapitalization were proved at trial primarily through the testimony of David Lev, the brother of Shimon Lev. David Lev was in Israel from July 3 to July 23, 1986. When David returned, Shimon told him that he had "made it big" by purchasing Colt call options based on a tip he had received from petitioner. Shimon asked David to become the nominal owner of the options. Shimon explained that he was concerned about an investigation into his trading in the Colt options, and he thought that David's presence in Israel would provide him with an alibi. In early August 1986, after David agreed to the plan, funds were transferred from Datek Securities to David's bank account. Pet. App. A7-A8.

After David deposited Shimon's proceeds from the Colt options transactions into his bank account, Shimon told David that he owed petitioner either $45,000 or $56,000 as

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[3] In contrast to the 50 telephone calls to his relatives and to Stein and the 14 calls to the brokerage houses that petitioner made between July 10 and July 16, petitioner made no calls to his relatives, to Stein, or to brokerage firms during the days immediately before and after the July 10 to July 16 period, except for three telephone calls to Listokin and 16 calls to Listokin's company. Pet. App. A6.

petitioner's share of the Colt options deal. Shimon explained, however, that petitioner had agreed to accept only $25,000 so that David, as the nominal holder of the proceeds from the Colt options transactions, could pay taxes on the capital gains. David subequently gave Shimon a check for $25,000 with the payee line left blank. In an attempt to launder the payment, Shimon made the check payable to Bnos Rochel, a charity from which, as he told David, he believed that he could get cash. Pet. App. A8.

c. Petitioner did not testify at trial. As his defense, petitioner argued that the government had not established beyond a reasonable doubt that he obtained information about the Colt recapitalization known by him to be confidential or that he had any involvement in the purchases of the Colt call options (Pet. 11-12). Petitioner called five character witnesses, an options expert, and the brokers of George Hirschberg and Walter Hertzberg.

4. The court of appeals affirmed (Pet. App. A1-A20). It first held (*id.* at A10-A15) that the district court did not abuse its discretion in refusing to dismiss the superseding indictment or to grant a continuance of the trial. Analyzing petitioner's several assertions of prejudice from the denial of a continuance (*id.* at A11-A15), the court concluded that "the superseding indictment did not alter substantially the government's case against [petitioner]" and "[i]ts return, even two days before trial, caused him no prejudice" (*id.* at A15).

The court of appeals also ruled (Pet. App. A15-A16) that the government did not violate the rule of *Brady* v. *Maryland,* 373 U.S. 83 (1963), by failing to turn over allegedly exculpatory grand jury testimony of Shimon Lev. The court observed (Pet. App. A16) that petitioner "had been informed specifically in the government's letter of July 23, 1987 that Shimon might have given the grand

jury exculpatory evidence." The court accordingly concluded that "[n]o *Brady* violation occurred here because *Brady* does not require the government to turn over exculpatory evidence 'if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.' " Pet. App. A15 (quoting *United States* v. *Gaggi,* 811 F.2d 47, 59 (2d Cir. 1987), cert. denied, No. 86-1818 (June 15, 1987)). The court did not resolve (Pet. App. A16) petitioner's claim that *Brady* entitled him to the actual transcripts of the grand jury testimony under Fed. R. Evid. 806 in order to impeach Shimon Lev—who did not testify at trial but who was the declarant of various co-conspirator statements testified to by David Lev—because "[petitioner] never raised his impeachment argument in the district court and therefore waived it."

The court rejected (Pet. App. A17-A18) petitioner's contention that his conduct did not violate the mail fraud statute because, under *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), Kramer Levin did not have a "property interest" in the confidential information concerning the Colt recapitalization. Finding petitioner's contention to be "specious," the court concluded (Pet. App. A18) that "the information in this case regarding the Colt recapitalization clearly falls within the definition of property under *Carpenter.*" The court observed (*ibid.*) that "the fact that Kramer Levin could not commercially exploit the information by trading on it does not mean the confidentiality of the information had no commercial value to the firm * * * because, by maintaining confidentiality, the firm would protect or enhance the firm's ~~its~~ reputation, with the result that it would not lose its clients and perhaps would gain more clients."[4]

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[4] Petitioner also argued before the court of appeals that his mail fraud conviction should be reversed because the mailings of the broker

ARGUMENT

1. Petitioner first renews his claim (Pet. 14-30) that he was entitled to a continuance of the trial because the superseding indictment was returned two business days before the scheduled trial date.

Contrary to petitioner's contention (Pet. 16-18), the decision of the court of appeals does not constitute a departure from well-established law. It has long been settled that a trial court has broad discretion to grant or deny a continuance. See, *e.g.*, *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940). More particularly, the Court recognized in *United States* v. *Rojas-Contreras*, 474 U.S. 231, 236 (1985), that a district court should use that "broad discretion" to "take care of any case in which the Government seeks a superseding indictment which operates to prejudice a defendant." In accordance with petitioner's own presentation in the court of appeals (Pet. C.A. Br. 18), the court of appeals treated petitioner's challenge (Pet. App. A10) as turning on whether petitioner showed prejudice from the denial of a continuance. The court of appeals correctly held (*id.* at A10-A15) that petitioner had failed to make such a showing.

Petitioner's principal claim in this Court (Pet. 17, 26-27) is that the court of appeals failed to consider his need to prepare a defense to the new charges and to evaluate the impact of the superseding indictment on his theory of

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confirmation slips were only incidental to his scheme to defraud. In addition, petitioner argued that the district court committed plain error by failing to instruct the jury that it was required to find that he knew of Kramer Levin's confidentiality policy and that he knew he was violating the policy when he disclosed the confidential information. The court of appeals concluded (Pet. App. A16-A17, A20) that both arguments were "frivolous," and petitioner does not renew them here.

defense. That contention is wrong. The court of appeals did not overlook petitioner's assertion of prejudice; it merely demanded that petitioner do more than baldly assert an adverse effect on his defense. The court properly required petitioner to show with particularity how his defense was prejudiced, and it concluded that each of petitioner's particular claims of prejudice was without merit.

Thus, the court of appeals correctly rejected (Pet. App. A11-A13) petitioner's primary allegation of prejudice from the superseding indictment—namely, that the indictment allowed admission of certain inculpatory co-conspirator statements made by David Lev, Shimon Lev, and Norman Stein. Those statements, the court observed (*id.* at A12 (emphasis in original)), "would have been *equally* admissible (or inadmissible) under either indictment" as evidence of fraudulent intent. For that reason, the court concluded, petitioner could not point to the co-conspirator statements as an adverse conequence of the new indictment. Petitioner does not challenge that conclusion in this Court. With respect to petitioner's less specific assertion that the denial of a continuance impaired his ability to defend against the new charges that were added by the superseding indictment (involving the Listokin trades), the court of appeals explained (*id.* at A13-A14) that petitioner had not pointed to any aspect in which he had been unfairly denied adequate time to prepare a defense. The court of appeals pointed out (*ibid.*) that the government had provided petitioner with full discovery regarding the Listokin trades three months before the return of the superseding indictment and that those trades were being investigated in the parallel SEC civil proceeding. The court concluded (*id.* at A14) that "[petitioner] therefore both knew that the government would be using the Listokin trades at trial and had the opportunity to attack the telephone records for accuracy." Finally, the court concluded (*ibid.*) that petitioner suffered no prejudice from the new indictment's

allegation that petitioner personally benefited from the fraudulent scheme, because that allegation was not a required element of any of the offenses alleged in the indictment. Petitioner does not challenge that conclusion either.

At bottom, petitioner simply disagrees with the conclusion of both courts below that he failed to show that he needed more time to prepare his defense than he was afforded after the superseding indictment was returned. Petitioner's claim that he was entitled to additional time is based on nothing more than his unsubstantiated assertion (Pet. 20) that the superseding indictment "compelled him to adjust his overall defense." But petitioner has never explained how his general "failure-of-proof" defense at trial was altered by the return of the superseding indictment.[5] The court of appeals found (Pet. App. A15) that "the superseding indictment did not alter substantially the government's case against [petitioner]" and "[i]ts return, even two days before trial, caused him no prejudice." Those factbound conclusions do not warrant further review.[6]

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[5] Indeed, when petitioner sought a continuance in the district court, he did not make any particularized showing of how the superseding indictment required him to alter his trial strategy or otherwise required additional time to prepare a defense. Yet this Court has made clear that "the reasons presented to the trial judge at the time the request [for a continuance] is denied" are particularly important in evaluating whether the trial court abused its discretion. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).

[6] Because the court of appeals considered the impact of the superseding indictment on petitioner's need for additional preparation, there is no merit in petitioner's claim (Pet. 18, 26-27) that the decision here conflicts with *United States* v. *Guzman*, 754 F.2d 482 (2d Cir. 1985), cert. denied, 474 U.S. 1054 (1986). In any event, petitioner's claim of an intracircuit conflict would raise an issue for the court of appeals, and not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Petitioner does not otherwise point to any conflict among the circuits on the continuance question.

2. Petitioner next contends (Pet. 31-47) that his use of fraudulently misappropriated information for trading in securities did not violate the federal securities laws. This contention involves legal issues that have not been widely considered by the lower courts. Indeed, the Second Circuit is the only court of appeals that has yet had occasion to address the theory on which petitioner's conviction under Section 10(b) and Rule 10b-5 is based—that fraudulent misappropriation of confidential information for use in securities trading constitutes fraud in connection with the purchase or sale of securities.[7] In the absence of discussion of the issue by other courts of appeals, let alone a split in the circuits, consideration by this Court would be premature. In any event, as we now explain, petitioner was correctly convicted of securities fraud under the misappropriation theory, and the question that evenly split this Court in *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), slip op. 5, is not presented here.

Section 10(b) prohibits the use, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device or contrivance" in violation of rules promulgated by the SEC. 15 U.S.C. 78j(b).[8] Rule 10b-5 in turn prohibits "*any* person" from engaging in "*any* act" [or] practice" that "operates or would operate as a fraud or

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[7] See *United States* v. *Carpenter,* 791 F.2d 1024 (2d Cir. 1986), aff'd in relevant part by an equally divided court, No. 86-422 (Nov. 16, 1987); *SEC* v. *Materia,* 745 F.2d 197 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *United States* v. *Newman,* 664 F.2d 12 (1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983). Cf. *Rothberg* v. *Rosenbloom,* 771 F.2d 818, 825 (3d Cir. 1985) (Higginbotham, J., concurring); *SEC* v. *Clark,* No. 87-711Z (W.D. Wash. Sept. 8, 1988).

[8] Petitioner seems to attach significance (Pet. 35-36) to the fact that "manipulation" generally refers to practices that are intended artificially to affect market activity, such as wash sales, matched orders, or rigged prices. It is not clear what point petitioner is trying to make, as manipulation was not charged in this case.

deceit upon *any* person" in connection with the purchase or sale of securities. 17 C.F.R. 240.10b-5 (emphasis added). This Court has consistently construed those provisions broadly, noting that Section 10(b) is "a 'catchall' clause to enable the Commission to 'deal with new manipulative or cunning devices' " (*Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 203 (1976) (brackets omitted)) and that the statute and rule "are obviously meant to be inclusive." *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 151 (1972). See generally *Herman & Maclean* v. *Huddleston,* 459 U.S. 375, 386 (1983); *United States* v. *Naftalin,* 441 U.S. 768, 773 (1979). See also S. Rep. 792, 73d Cong., 2d Sess. 6 (1934).

Petitioner's conduct was plainly fraudulent. Indeed, petitioner does not appear to dispute that he committed fraud when he misappropriated information that was held in confidence by the law firm employing him and by its client, and then gave the information to others for them to use in purchasing securities. When petitioner misappropriated—"stole to put it bluntly" (*Chiarella* v. *United States,* 445 U.S. 222, 245 (1980) (Burger, C. J., dissenting)—the confidential information, he committed what this Court has referred to as "a 'garden variety' type of fraud." *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U.S. 6, 11 n.7 (1971). See *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987), slip op. 7-8 (finding that the misappropriation of confidential information used in securities trading constitutes fraud under the mail and wire fraud statutes); *United States* v. *Newman,* 664 F.2d 12, 18 (2d Cir. 1981), aff'd after remand, 722 F.2d 729 (2d Cir.), cert. denied, 464 U.S. 863 (1983).[9]

[9] Outside the securities context, this Court has found similar breaches of fiduciary duty to be fraudulent. See, *e.g., United States* v. *Carter,* 217 U.S. 286, 305-310 (1910); *Wardell* v. *Railroad Co.,* 103 U.S. 651, 654-659 (1880).

Petitioner argues (Pet. 33-34) that his fraud was not "in connection with" the purchase or sale of securities. But the sole purpose of petitioner's scheme was to use the stolen information secretly and deceptively to trade in securities and thereby "reap instant no-risk profits in the stock market." *SEC* v. *Materia,* 745 F.2d 197, 203 (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985). The fraud had no purpose other than to facilitate the purchase or sale of securities.

Moreover, contrary to petitioner's assertion (Pet. 31-32), Section 10(b) and Rule 10b-5 are not limited to frauds whose direct victims are those who actually purchase or sell securities. While this Court has held that a private litigant bringing a Rule 10b-5 damages action must be a purchaser or seller of securities (*Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975)), that ruling concerns plaintiffs' standing and applies only to private suits (*id.* at 740-744); it is not based on any limitation of Rule 10b-5 to frauds committed on purchasers or sellers. Indeed, this Court's decision in *United States* v. *Naftalin,* 441 U.S. 768 (1979), makes it clear that in a government enforcement action the victim of securities fraud need not be a purchaser or seller, or even an investor. This is consistent with the language of Rule 10b-5, which, by its terms, proscribes "any * * * fraud" committed on "any person."[10]

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[10] Petitioner cites then-Judge Stevens' opinion for the Seventh Circuit in *Eason* v. *General Motors Acceptance Corp.*, 490 F.2d 654, 659 (1973), cert. denied, 416 U.S. 960 (1974), as imposing a "requirement that the injured party be an investor" (Pet. 38 n.3). That case is not applicable here. The injured party in *Eason* was in fact an investor, and because the action was a private suit for damages, there was no reason for the *Eason* court to determine whether, in a government enforcement action, the victim of the fraud must be an investor.

This case well illustrates why frauds like petitioner's are within the purpose of Section 10(b) and Rule 10b-5 to protect the securities markets. The jury was charged, in accordance with the indictment, that it could convict if it found actual or potential injury either to Kramer Levin or to its client, the pension plan. See Tr. 1369. The pension plan was, of course, a significant Colt shareholder, and following petitioner's fraudulent use of its information, the plan traded in Colt securities. Even if we focus only on the fraud committed on the law firm, however, it is clear that petitioner's fraud threatened direct "market participants," such as the pension plan. The plan was seeking advice on the fairness of a recapitalization, in which it would exchange its existing securities for new securities while other shareholders would receive a mix of cash and securities. Market activity generated by petitioner's tips could have affected the firm's analysis of the recapitalization or the terms of the recapitalization itself. Moreover, petitioner's argument fails to recognize that the illegal trading he caused directly undermined the integrity of the securities markets. His scheme permitted his tippees to make trades with an advantage grounded on their use of fraudulently misappropriated information that was not lawfully available to the other parties to the transactions. Such conduct is the antithesis of the "open and honest market" for securities that Section 10(b) was intended to protect. *Materia*, 745 F.2d at 203. See *Naftalin*, 441 U.S. at 775 (emphasis omitted) (the securities laws aim " 'to achieve a high standard of businesss ethics * * * in every facet of the securities industry' " (quoting *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186-187 (1963)).

Petitioner further asserts (Pet. 39) that this Court's decisions in *Chiarella* v. *United States*, 445 U.S. 222 (1980), and *Dirks* v. *SEC*, 463 U.S. 646 (1983), hold that "trading

securites on the basis of undisclosed information is fraud under section 10(b) and Rule 10b-5 only where the trader owes a duty of disclosure [to] a market participant." But *Chiarella* and *Dirks* say no such thing. Those decisions merely hold that it does not suffice to allege simply that the defendants defrauded the other parties to the transactions by trading or causing trading without disclosing material nonpublic information to those other parties, where the defendants owed no duty of disclosure to those parties. See *Dirks*, 463 U.S. at 653-654; *Chiarella*, 445 U.S. at 228-230. Neither decision remotely suggests that a fraud committed on a person by misappropriating confidential information from that person—especially a person who was entrusted with the information by a direct market participant—is outside the coverage of Rule 10b-5. In *Chiarella*, no such theory was presented to the jury; indeed, all four Justices who spoke to the issue suggested that a misappropriation theory might be valid.[11] In *Dirks*, the issue did not arise because, as the Court was careful to note (463 U.S. at 665), the defendant did not misappropriate any information.[12] Since *Dirks* and *Chiarella*,

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[11] See 445 U.S. at 239 (Burger, C. J., dissenting); *id.* at 238 (Brennan, J., concurring in the judgment); *id.* at 245 (Blackmun, J., joined by Marshall, J., dissenting).

[12] Petitioner incorrectly argues (Pet. 47) that he was charged as a "tippee" of the law firm or its client and that the standards for tippee liability set forth in *Dirks* were not met here. *Dirks* involved an allegation that Dirks was improperly "tipped" by a company insider about secret corporate developments and thereby acquired the fiduciary duties of an insider to the company and its shareholders. 463 U.S. at 655-656. This Court held that, because the insider received no benefit for his tips, Dirks, who was a stranger to the company, acquired no such duties (*id.* at 665-667). Petitioner, by contrast, was not charged as a tippee. The duties he breached in misappropriating information and passing it on to others stemmed not from his receipt of an illegal "tip," but from his position as an attorney at the law firm. Thus, peti-

moreover, this Court, rather than questioning the validity of the misappropriation theory, has in fact suggested that trading on "misappropriate[d] or illegally obtain[ed] information" constitutes fraud in violation of Rule 10b-5. *Bateman Eichler, Hill Richards, Inc.* v. *Berner,* 472 U.S. 299, 313 n.22 (1985) (quoting *Dirks*, 463 U.S. at 665).[13]

Finally, petitioner incorrectly asserts (Pet. 43 (footnote omitted)) that further review of this case is justified on the ground that the validity of the misappropriation theory "evenly split this Court in its most recent analysis of the issue" in *Carpenter* v. *United States, supra.* Petitioner misunderstands the *Carpenter* case. *Carpenter* involved a securities fraud conviction—which was affirmed by an equally divided Court without any discussion of the issue—where a newspaper with "no interest in the securities traded" was "the only alleged victim of the fraud" (slip op. 5). Here, in contrast, the wrongdoer's employer, the law firm that was defrauded, was entrusted with confidential information by a securities holder and thereby had a fiduciary relationship to a direct market

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tioner's assertion (Pet. 47) that he breached no duty because the "alleged tipper—whether it be Petitioner's law firm or its client"—did not benefit from the disclosure to petitioner is misdirected. Petitioner had duties arising out of his own position, not because he was a tippee.

[13] The misappropriation theory has also been recognized in Congress as a valid basis for liability under the securities laws. The House Report accompanying the Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264, explained that "[i]n other areas of the law, deceitful misappropriation of confidential information by a fiduciary * * * has consistently been held to be unlawful"; the report added that Congress "has not sanctioned a less rigorous code of conduct under the federal securities laws." H.R. Rep. 98-355, 98th Cong., 1st Sess. 5 (1983) (footnotes omitted).

participant. In addition, the law firm was not the only victim of the fraud: the client pension plan, which traded in Colt securities, was also a victim of the fraud.

3. Petitioner also contends (Pet. 48-55) that he did not commit mail fraud because the confidential information concerning the Colt recapitalization plan that he misappropriated was not "property" within the meaning of the mail fraud statute. That contention is meritless.

In *Carpenter* v. *United States,* this Court upheld the mail and wire fraud convictions of a Wall Street Journal reporter who traded stock in anticiption of the publication of the Journal's "Heard on the Street" column, a well-known feature that often had an effect on the market price of the stocks discussed there (slip op. 3). The Court in *Carpenter* made clear that the intangible nature of the misappropriated confidential business information did not make that information any less a form of "property" within the meaning of the mail fraud statute (*id.* at 6).[14] The Court explained that " 'a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom' " (*id.* at 8 (citation omitted)). The Court concluded that the Journal had a property interest

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[14] In *McNally* v. *United States*, No. 86-234 (June 24, 1987), the Court held that the mail fraud statute does not proscribe "schemes to defraud citizens of their intangible rights to honest and impartial government" (slip op. 5). As this Court later explained in *Carpenter,* such a scheme is "too ethereal in itself to fall within the protection of the mail fraud statute, which 'had its origin in the desire to protect individual property rights' " (slip op. 6 (quoting *McNally,* slip op. 9 n.8)).

in maintaining the confidentiality of the contents and timing of its column (*id.* at 6) and that, because the reporter obtained the information in the course of his employment, he was bound not to use it in a manner not authorized by the Journal (*id.* at 8).

The court of appeals in this case correctly held that the confidential information misappropriated by petitioner was no less a form of property than the information at issue in *Carpenter*. The information was, of course, confidential information held by the pension plan in its capacity as shareholder and by Kramer Levin in its capacity as a law firm; it was of substantial value to both—indeed, it was essential to the ability of both the law firm and the pension plan trustees to carry out their responsibilities. As the court of appeals observed with respect to the law firm (Pet. App. A18), by appropriating the confidential information concerning the Colt recapitalization plan petitioner affected Kramer Levin's economic interests, in that the law firm sought to preserve its business reputation by maintaining the confidentiality of the information, "with the result that it would not lose its clients and perhaps would gain more clients." Similarly, the pension plan had an economic interest in preserving the confidentiality under which it had been entrusted with early information about the recapitalization.

Contrary to petitioner's suggestion (Pet. 51-53), it is irrelevant that the information concerning the Colt recapitalization was not obtained by Kramer Levin or its client in the same manner as the Wall Street Journal acquired its confidential information in *Carpenter*. Although the Court in *Carpenter* observed that the Journal had gathered its information through its own enterprise and had the exclusive right to exploit the information (slip op. 7), those factors are not prerequisites to a business's having a property interest in information. As

the court of appeals observed (Pet. App. A18 (emphasis in original)), the Court's opinion in *Carpenter* "merely *describes* the confidential information in that case; it does not require that *all* confidential information must be of the same nature to be considered 'property.' " Here, Kramer Levin acquired the information concerning the Colt recapitalization from its client through a confidential relationship solely for the purpose of providing legal services and with the understanding that the information would remain confidential. Accordingly, even though Colt developed the information about the recapitalization, Kramer Levin and the pension plan had property interests in maintaining the confidentiality of that information.

It is likewise irrelevant, contrary to petitioner's suggestion (Pet. App. 51-52), that his misappropriation of the confidential information may not have interfered with the ability of Kramer Levin or the pension plan to use the information, and that the law firm suffered no monetary loss. This Court expressly rejected similar arguments in *Carpenter*. Slip op. 7 ("Petitioners' arguments that they did not interfere with the Journal's use of the information or did not publicize it and deprive the Journal of the first public use of it * * * miss the point"). Indeed, the Court made clear in *Carpenter* that a scheme to defraud does not require an actual monetary loss in order to fall within the scope of the mail fraud statute (*ibid.*). It was sufficient here that Kramer Levin, together with its client, was deprived of the right to use the confidential information exclusively for the purpose for which that information had been entrusted to the law firm.[15]

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[15] Petitioner asserts (Pet. 49-51, 54-55) that this Court should grant his petition because the lower courts are in "disarray" and need further guidance on what constitutes property protected by the mail fraud statute. As petitioner appears to concede, however, none of the cases that he cites (*id.* at 50-51) conflicts with the decision of the court of ap-

4. Finally, petitioner renews his contention (Pet. 56-58) that the government violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to turn over the transcripts of the grand jury testimony of Shimon Lev. That contention is likewise without merit.

It is well settled that *Brady* does not require the government to turn over exculpatory evidence if a defendant knows or should have known the essential facts permitting him to take advantage of the exculpatory evidence. See, *e.g.*, *United States* v. *Valera*, 845 F.2d 923, 927-928 (11th Cir. 1988); *United States* v. *Wolf*, 839 F.2d 1387, 1391-1392 (10th Cir. 1988); *United States* v. *Esposito*, 834 F.2d 272, 275 (2d Cir. 1987); *United States* v. *Dupuy*, 760 F.2d 1492, 1501-1502 & n.5 (9th Cir. 1985); see also *United States* v. *Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977) ("numerous cases have ruled that the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain [for] himself"). Here, the government specifically notified petitioner more than a week before trial that Shimon Lev might have given exculpatory testimony before the grand jury (Pet. App. A9, A16). Since that letter plainly made known to petitioner that Shimon Lev could provide exculpatory evidence, he could

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peals here. Thus, of the four cited decisions in which the court found no property interest, one involved the same instruction that the Court found invalid in *McNally* (*United States* v. *Ochs*, 842 F.2d 515 (1st Cir. 1988)), and two involved alleged fraudulent deprivation of typical *governmental* powers (*United States* v. *Murphy*, 836 F.2d 248 (6th Cir. 1988) (bingo permits); *United States* v. *Evans*, 844 F.2d 36 (2d Cir. 1988) (control of arms sales)). Only one of the cited decisions involved a private interest (*United States* v. *Baldinger*, 838 F.2d 176 (6th Cir. 1988)), and the court there found it critical that the defendant's conduct was "unrelated to motives of [proprietary] gain" (*id.* at 179-180). The present case, of course, involved a private interest that the defendant misappropriated for proprietary gain.

easily have taken advantage of that information by calling Shimon as a witness. See *United States* v. *LeRoy,* 687 F.2d 610, 619 (2d Cir. 1982) (calling the grand jury witness to testify is the "obvious course"), cert. denied, 459 U.S. 1174 (1983). Petitioner, however, did not call Shimon as a witness, even though Shimon was readily available to him. For that reason, the court of appeals properly concluded (Pet. App. A15) that "[n]o *Brady* violation occurred here."

Petitioner argues principally (Pet. 56-58) that the grand jury transcripts might have been used, pursuant to Fed. R. Evid. 806, to impeach the co-conspirator hearsay declarations of Shimon Lev (to which David Lev testified). As the court of appeals observed (Pet. App. A16), however, petitioner never explained to the district court before or during trial that he wanted the grand jury transcripts so that he could impeach Shimon Lev's credibility by the inconsistencies between his grand jury testimony and his declarations to David Lev. And when petitioner first raised his claim in a post-trial motion, he failed to show that the grand jury testimony was admissible to attack Shimon Lev's co-conspirator declarations. Accordingly, the court of appeals properly concluded (Pet. App. A16) that petitioner had waived his claim to the transcripts based on Fed. R. Evid. 806.

In any event, the government's failure to turn over the grand jury transcripts for impeachment purposes did not violate *Brady* because the evidence was not material to the determination of guilt. See *United States* v. *Agurs,* 427 U.S. 97, 107-110 (1976); *Brady* v. *Maryland,* 373 U.S. at 104. Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Pennsylvania* v. *Ritchie,* No. 85-1347 (Feb. 24, 1987), slip op. 15; *United States* v. *Bagley,* 473 U.S. 667, 682 (1985). There is no such reasonable probability of a different result in this case. After petitioner raised his

claim in a post-trial motion, the district court reviewed the transcripts of Shimon Lev's grand jury testimony *in camera*. Based on that review, the district court found that "even if [petitioner] had those minutes it would have no effect whatever on the outcome of the trial" (9/15/87 Tr. 5). Indeed, the court concluded that the grand jury testimony, if admitted, "would have been highly damaging to the defendant's case because of the contents" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
Assistant General Counsel

RANDALL W. QUINN
Attorney
Securities and Exchange Commission

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ISRAEL G. GROSSMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway, Suite 2515
New York, New York 10007
(212) 513-7676

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Victoria B. Eiger
Of Counsel

Attorneys for Petitioner
Israel G. Grossman

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PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

This case raises the stark question whether a defendant can be forced to trial on new federal criminal charges with only two days' notice.

The Solicitor General argues, as did the United States Attorney below, that Petitioner was not entitled to relief even though a superseding indictment which added a number of new counts and dramatically expanded the time frame of the alleged charges was returned two days before his trial began. The Solicitor General argues, as did the United States Attorney below, that Petitioner failed to establish any prejudice as a result of the denial of any continuance.

In essence, the Solicitor General, the United States Attorney, the Court of Appeals, and the United States District Court for the Southern District of New York have all taken

the position that a defendant cannot complain that he was tried without an opportunity to prepare a defense unless he also shows -- at the very time he is asking for time to prepare a defense -- what his defense will be and/or demonstrates to the appeals court what specific prejudice he suffered because he was not given time to prepare.

The absurdity and the unfairness of this position cannot go unchallenged.

To require appellate counsel to articulate what Petitioner's defenses might have been (when the defenses are not reflected in the record because trial counsel did not have an opportunity to ascertain the defenses) is truly bizarre. Even if appellate counsel could describe such defenses, it would raise matters which are, by definition, outside the record and thus could not properly be put before the appeals court or this Court. Even

Petitioner's trial counsel may well not have known what Petitioner's defense or defenses could have been. His complaint to the trial court was that he needed time to ascertain just this, to explore the relevant facts with his client, to make whatever investigation into the facts was appropriate, and then to consider the range of legal defenses which might be available. It would have been the height of frivolity for trial counsel to have spent his valuable preparatory time before the superseding indictment was returned preparing a defense to charges which might be brought in a superseding indictment instead of preparing for what was in fact in the indictment which had been returned.

All along, Petitioner has confronted a classic Catch-22 situation and now the government asks this Court to approve it. Petitioner has been required to show how his

defense was prejudiced where the crux of his complaint is precisely that he was deprived of a meaningful opportunity to prepare a defense.

This Court should therefore grant certiorari to consider whether, in the federal courts, a defendant must always be given an opportunity to prepare a defense to a superseding indictment which makes substantial substantive changes in the charges against him and, if not, what showing he must make to establish his entitlement to defense preparation time.

CONCLUSION

For these reasons, and for the reasons set forth in the Petition, Petitioner respectfully asks that the writ of certiorari be granted.

Respectfully submitted,

Nathan Z. Dershowitz
Dershowitz & Eiger, P.C.
225 Broadway
New York, New York 10007
(212) 513-7676

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 495-4617

Attorneys for Petitioner

Dated: October 17, 1988
New York, New York